

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7677, 7681

United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,

Plaintiff-Appellee,

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each
in their own capacity as directors of Alleghany Cor-
poration, and as attorneys for and guardians of the
property of Allan P. Kirby, Sr., JOHN J. BURNS, JR.,
Defendants-Appellants.

RALPH K. GOTTSHALL, RICHARD R. HOUGH, WILLIAM G. RABE,
CLIFFORD H. RAMSDALL, and CARLOS J. ROUTH, as direc-
tors of Alleghany Corporation,

Defendants,

and ALLEGHANY CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

CAHILL GORDON & REINDEL

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Attorneys for Defendants-Appellants

John E. Tobin, Fred M. Kirby,

Allan P. Kirby, Jr. and

John J. Burns, Jr.

(212) 752-6400

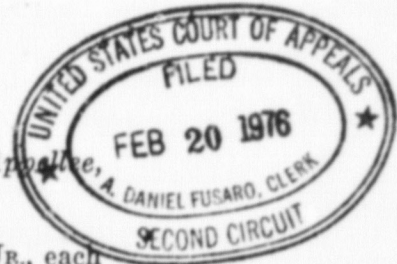
MR. RANDOLPH PHILLIPS

30 East 72nd Street

New York, New York 10021

Plaintiff-Appellee Pro se

(212) 734-6776



PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

1a

Form No. 106 Rev.

JUDGE WARD
ATTORNEYS

TITLE OF CASE

RANDOLPH PHILLIPS

VS

For plaintiff:

Randolph Phillips
30 East 72nd Street, NYC 10021
734 6776

JOHN E. TOBIN,
FRED M. KIRBY,
ALLAN P. KIRBY JR. each in their own
capacity as directors of Alleghany
Corporation and as attorney for and
guardians of the property of
ALLAN P. KIRBY SR.
JOHN J. BURNS JR.
RALPH K. GOTTSALL
RICHARD R. HOUGH
WILLIAM G. RABE
CLIFFORD H. RAMSDELL and
CARLOS J. ROUTH as directors of
ALLEGHANY CORPORATION, and
ALLEGHANY CORPORATION

For defendant:

Debevoise, Plimpton, Lyons & Gates
299 Park Ave. N.Y.C. 10017 752-6400
(J. Tobin, F. Kirby, A. Kirby & J. Burns)

Cahill, Gordon & Reindel (Allegheny Corp.)
80 Pine St. N.Y.C. 10005 944-7400

| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISH. |
|------------------------|--------------|----------|---------------------|------|-------|
| 5 mailed | Clerk | 12/30/46 | Phillips | 15 | 15 |
| 6 mailed | Marshal | 1/31/47 | LIST | | |
| s of Action: Violation | Docket fee | | | | |
| of Interstate Commerce | Witness fees | | | | |
| & Securities Act | | | | | |
| 1934 | | | | | |
| on arose at: | Depositions | | | | |

Randolph Phillips vs John E. Tobin et al
74 Civil 5740

2a
74 CIV. 5740

Pg #2

| DATE | PROCEEDINGS | Date of Judgment |
|-----------|--|------------------|
| Dec 30-74 | Filed Complaint & Issued Summons | |
| Jan 27.75 | Filed Stip & Order that the time for defts. J.E. Tobin, E.M. Kirby, A.P. Kirby, Jr., & J.J. Burns, Jr. to answer is extended to 3/7/75. So Ordered Ward J. | |
| Jan 28.75 | Filed Stip & Order that the time for deft. Alleghany Corp. to answer is extended to 3/7/75. So Ordered Ward J. | |
| Feb 6.75 | Filed Summons & marshals ret. Served: John J. Burns, Jr. on 1/6/75 Alan P. Kirby Jr. on 1/6/75 Fred M. Kirby on 1/6/75 Clifford H. Ramsdell on 1/29/75 Alleghany Corp. on 1/6/75 John E. Tobin on 1/8/75 | |
| Feb 25.75 | Filed Order to Show Cause to vacate Deposition notice with a stay Ordered the aforementioned depositions are Stayed pending the determination of the aforesaid motion to vacate Ward J. ret. 3/11/75 | |
| Feb 25.75 | Filed Defts. Memorandum of Law. | |
| Mar 6.75 | Filed Pltff's. affidavit in opposition to defts'. motion for a protective order. | |
| Mar 6.75 | Filed Pltff's. memorandum in opposition to defts'. motion for a protective order. | |
| Mar 6.75 | Filed Amended Complaint. | |
| Mar 11.75 | Filed Deft's. reply memorandum in support of motion for a protective order. | |
| Mar 17.75 | Filed ANSWER to amended complaint of Defts. John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr. & John J. Burns, Jr. | |
| Mar 18.75 | Filed ANSWER of deft. Allegheny Corporation | DPLG CG&R |
| Mar 24.75 | Filed Deft's. reply memorandum in support of motion for a protective order. | |
| Mar 24.75 | Filed Memo. End. on motion dtd. 2/25/75. Motion granted. Pltffs. notice of deposition dtd. 2/15/75 is vacated & all depositions are stayed pending a pre trial conference on 4/11/75 at 11:00 a.m. Ward J. (mailed notice) | |
| 4-11-75 | PRE TRIAL CONFERENCE HELD BY Ward | |
| May 6.75 | Filed Deft's. (Tobin, et al.) notice of motion for judgment on the pleadings dismissing the complaint, ret. 6-3-75. | |
| May 6.75 | Filed Defts'. (Tobin, et al.) memorandum in support of motion for judgment on the pleadings. | |
| May 6.75 | Filed Deft's. (Allegheny) notice of motion for a judgment dismissing the amended complaint, ret. 6-3-75. | |
| May 6.75 | Filed Deft's. (Alleghany) affidavit in support of motion to dismiss the amended complaint. | |
| May 6.75 | Filed Deft's. (Alleghany) memorandum in support of motion to dismiss the amended complaint. | |
| May 6.75 | Filed Defts'. (Allegheny & Tobin, et al) affidavit by Jared C. Horton in support of motions to dismiss. | |
| May 6.75 | Filed affidavit of Theodore E. Somerville in support of Defts'. (Alleghany & Tobin, et al) motions to dismiss. | |
| 05-22-75 | Filed Stip & Order extending return date of Defts'. (Tobin, et al) motion to dismiss, to 6-24-75. Answering papers to be served by 6-2-75. Reply papers to be served by 6-20-75.....Ward, J. | |
| 06-03-75 | Filed Pltff's. affidavit in opposition to the motions of defts. Tobin, Burns, Fred M. Kirby and Allan P. Kirby and Alleghany Corp. for judgment on the pleadings and/or to dismiss the amended complaint. | |
| 06-03-75 | Filed Pltff's. memorandum in opposition to defts'. motions for judgment on the pleadings and to dismiss. | |
| 06-23-75 | Filed Deft's. (Allegheny Corp.) reply affidavit of Joseph A. Clark III in support of motion to dismiss. | |
| 06-23-75 | Filed Deft's. (Allegheny Corp.) reply affidavit of M. Lauck Walton in support of motion to dismiss. | |

Cont'd. on Page #3

5740

Ward J.

Rev. Civil Docket Continuation

Page #3

3a

| E | PROCEEDINGS | Date Order or Judgment Noted |
|-------|---|------------------------------|
| 3-75 | Filed Deft's. (John E. Tobin, et al.) reply memorandum in support of motion for judgment on the pleadings. | |
| 3-75 | Filed Deft's. (Allegheny Corp.) reply memorandum in support of motion to dismiss the amended complaint. | |
| 11-75 | Filed Reply Affidavit by Randolph Phillips. | |
| 11-75 | Filed Pltffs. Reply Memorandum in opposition to motions of defts. for Judgment on the pleadings & to dismiss the amended complaint. | |
| -75 | Filed Deft. Allegheny Corp. Rejoinder Memorandum. | |
| -75 | Filed Defts. John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr. & John J. Burns, Jr. Rejoinder in support of the individual defts. for judgment on the pleadings. | |
| 75 | Filed Memorandum Order, defts. motion to dismiss is granted in part & denied in part. Counts II, IV, V, & VI of Phillips' amended complaint are dismissed. Defts. motion to dismiss the proxy fraud claim alleged in Count I, the derivative 10b-5 cause of action contained in Count III, & the Count VII state claims which arise from the Jones acquisition is denied. Ward J. (mailed notice) | |
| 75 | Filed Memo. End. on motion dtd. 5-6-75. Motion granted in part & denied in part in accordance with memorandum decision filed herewith. Ward J. (mailed notice) | |
| 75 | Filed Memo. End. on motion dtd. 5-6-75. (2nd One) Motion granted in part & denied in part in accordance with memorandum decision filed herewith. Ward J. (mailed notice) | |
| 75 | Filed Defts. John E. Tobin, Fred M. Kirby, Allan P. Kirby Jr. & John J. Burns Jr. Notice of motion for reargument. Ret. 12-2-75. | |
| 75 | Filed Memorandum of Law in support of the motion of the individual defts. for leave to reargue. | |
| 75 | Filed Deft. Allegheny Corp. affidavit and notice of motion for an order for clarification of court opinion. Ret. 12-2-75 | |
| 75 | Filed Deft. Allegheny Corp. Memorandum of Law. | |
| 75 | Filed Deft. Allegheny Corp's Notice of Appeal to USCA from Order entered 11-6-75. Notice of appeal mailed on 12-5-75 to R. Phillips, Debevoise, Plimpton, Lyons & Gates. | |
| 75 | Filed Defts. Tobin, Kirby, Kirby, Jr and Burns Jr's Notice of Appeal to USCA... from Order of 11-5-75.... Mailed Notices on 12-8-75 to: R. Phillips, Pltff & Cahill, Gordon & Reindel. | |
| 75 | Filed Bond #246786 undertaking for costs on appeal (Allegheny Corp's) \$250.00 - National Surety Corp. | |
| 75 | Filed Bond #246787 undertaking for costs on appeal (J. Tobin, J. E. Kirby, J. Burns) \$250.00 - National Surety Corp. | |
| 75 | Filed Pltff's Memo in opposition to the motions of defts. for leave to reargue for motion for clarification of court's opinion. | |
| 76 | Filed Memo End on bk of motion fld 11-17-75... Motion denied So Ordered. Ward, J. mn | |
| 76 | Filed " : : : : " " " .., reargue Motion denied. So Ordered, Ward, J. mn | |
| 76 | Filed appendix of decisions. | |
| 76 | Filed Notice to Docket Clerk that the record has been transmitted to USCA on 1-28-76. Filed Deft. Allegheny Corp's Notice of Appeal to USCA from orders of 11-6-75 & 1-20-76.... Copies mailed on 2-10-76 to: Randolph Phillips - Debevoise, Plimpton, Lyons & Gates Esqs. | |
| 76 | Filed defts J. E. Tobin, F. M. Kirby, A. P. Kirby, Jr., and J. J. Burns, Jr's Notice of Appeal to USCA from order of 11-6-75 & 1-20-76... Copies mailed on 2-9-76 to: R. Phillips & Cahill Gordon & Reindel. | |
| 76 | Filed Deft Allegheny Corp's Notice of motion for an protective order... ret 2-17-76 at 2:15PM. | |

Continue on Page #4

| DATE | PROCEEDINGS |
|---------|--|
| 2-11-76 | Pld Defts J. S. Robin, F.M.Kirby, Al P. Kirby, Jr and J. J. Burns Jr's NOTICE of Motion for an order staying discovery until 30 days after determination of the defts' appeal to the 2nd circuit.....etc.....ret 2-17-76, at 2:15PM. |
| 2-11-76 | Pld Defts' Memo of Law in support of its motion for stay pending appeal. |

RANDOLPH PHILLIPS,

Plaintiff,

74 Civil 5740 (RJW)

-against-

AFFIDAVIT

JOHN E. TOBIN, et al.,

Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein, appearing pro se, and I make this affidavit in opposition to the application of the defendants "for a protective order vacating the Notice of Deposition served upon counsel" by plaintiff "on February 19, 1975 noticing the deposition of Alleghany " and defendants John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr. and John J. Burns, Jr. commencing February 27, 1975.

1. The affidavit of Joseph A. Clark III, Esq. of Cahill Gordon & Reindel, attorneys for defendant Alleghany Corporation, sworn to February 25, 1975, and allegedly tendered in support of its application, has not been made, as required by the rules, in this civil action but in "Civil Action No. C-73-835" and thus may not be considered in this civil action No. 74-5740. I hereby object to its receipt in evidence.

2. * The memorandum of defendants submitted in support of the application is signed by Debevoise, Plimpton, Lyons & Gates, as attorneys for the above-mentioned individual defendants, but not by

any identified member or associate of that law firm. It therefore has been filed in violation of Rule 6(a)(3) of the General Rules of this Court. The individual members of the bar whose names appear on the memorandum are members or associates of the Cahill firm.

3. I therefore move that the aforesaid affidavit and memorandum be stricken from the files of this Court in this civil action.

4. These two law firms together have some 234 lawyers as members or associates with huge clerical and stenographic staffs and charge their clients an average of \$125 per hour. LIONS IN THE STREET by Paul Hoffman, subtitled The Inside Story of the Great Wall Street Law Firms (Saturday Review Press 1973), pp. 21, 32, 44, note.

5. I submit that with such resources and at such charges the Cahill and Debevoise firms are capable of turning-out proper legal papers, and should be required so to do.

6. I deny the allegation in Clark III's affidavit that "more time is necessary for counsel to familiarize themselves with the issues raised in the complaint" (par. 6), in view of the huge legal resources available to them compared with myself as attorney pro se, a one-man law firm as I humorously like to say; and the almost two months time that has elapsed since service of the complaint on January 6, 1975. (Clark III's affidavit, par. 2).

7. This is not a class action, and the complaint does not make the allegations necessary under Rule 23 of the Federal Rules of Civil Procedure nor the rules of this Court to maintain such an action.

8. I hereby represent based on my litigating record to date that I can "fairly and adequately represent the interests of the

shareholders" of Alleghany Corporation "in enforcing" in this derivative action "the right of the corporation." Rule 23.1, Federal Rules of Civil Procedure. No less than 23 members of the Judiciary have voted to uphold my position on the facts and the law in the following cases in which I appeared as a plaintiff or defendant pro se: *

Alleghany Corporation v. Breswick & Co. and Randolph Phillips, 353 U.S. 151 = Chief Justice Warren, and Justices Douglas and Black (dissenting).

In re Baltimore & Ohio Railroad Co., unreported fee decision, Bankruptcy Docket 9905, filed July 27, 1946. = Circuit Judges Soper & Dobie; District Judge Chesnut.

In re The United Corporation, 249 F.2d 168 (3 Cir. 1954) = Circuit Judges Kalodner, McLoughlin & Maris.

Willheim v. Murchison, 312 F.2d 399 (2 Cir. 1963) = Circuit Judges Clark, Kaufman & Hays.

Breswick & Co. and Randolph Phillips v. United States, 138 F.Supp. 123, = Circuit Judge Frank, District Judges Dimock and Walsh.

Phillips v. Murchison, 383 F.2d 370 (2 Cir. 1969), = Circuit Judges Waterman, Moore & Feinberg. (Judge Moore dissented in the first case, but joined in the above-cited order of January 25, 1970). Subsequent unreported decision = Judge Metzner.

Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et al., 218 F.Supp. 164 = District Judge Dawson.

United States of America v. The National Committee for Impeachment; Randolph Phillips, Chairman, et ano., 469 F.2d 1135 (2 Cir. 1972). = Circuit Judges Hays, Timbers & Oakes.

* This list is not exhaustive. Nor does it include State Court Judges.

9. Defendants' charge in their Memorandum (p.12) that I litigate "groundless claims" is repudiated by the \$613,000 in fees and damages recovered by me in only four cases among those listed above, which is not an exhaustive list. In the B&O case, supra, I was awarded a fee of \$5,000; in The United Corporation case, supra, I was awarded a fee of \$50,000 plus \$25,000 reimbursement of expenses; in the Zenn v. Anzalone case 46 Misc.2d 378 (which settled the Alleghany Corporative derivative case of Breswick v. Briggs, 135 F.Supp.397 (S. D. N. Y.)), I was awarded a fee of \$408,000; and in Phillips v. Murchison, supra, I received \$150,000 in settlement of the claims therein.

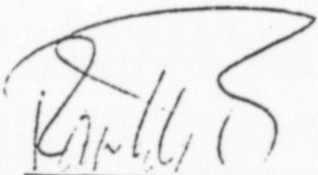
10. The three attorneys from the Cahill firm who sign the memorandum of defendant Alleghany Corporation herein have not shown that they ever have won a single case, nor has the anonymous signer of the Debevoise firm name, either when attached to or detached from their mammoth law firms. In these circumstances I challenge the ability of these three Cahill attorneys adequately and fairly to represent defendant Alleghany Corporation, of which I am a shareholder, herein.

11. I append as Exhibit A hereto a copy of my brief in support of the Impeachment for Bribery of Richard M. Nixon as President of the United States, both as evidence of my legal ability and of my ability to represent the public interest and thus the Alleghany shareholders.

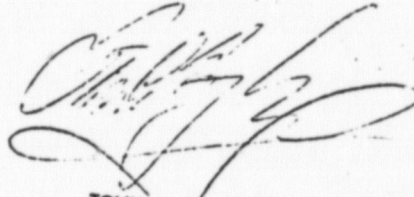
12. I append as Exhibit B hereto a letter of the Honorable Francis E. Walter, Chairman of the House Judiciary Subcommittee

on Administrative Procedure, dated January 18, 1960, which shows that the proxy fight in which I sought to gain 1-board seat representation for some 20,000 small stockholders of the Pennsylvania Railroad Company in 1958 was in fact decided adversely to me by S.E.C. administrative acts, which were relied on by the District Court in Gaudiosi v. Franklin, 166 F.Supp. 351 (E.D. Pa. 1958), that were not decided on the merits.

13. I hereby affirm that each and every one of the representations of fact made in my Memorandum in Opposition to defendants' application herein are true to the best of my knowledge, information and belief.


 RANDOLPH PHILLIPS

Affirmed to before me this
5th day of March, 1975.


 TONU A. ESPENBERG
 Notary Public, New York
 75
 York County
 Commission Expires March 30, 1976
 TONU A. ESPENBERG
 Notary Public, State of New York
 No. 21-422775
 Qualified in New York County
 Commission Expires March 30, 1976

To the Delegates of the
Republican National Convention

The President,
the Supreme Court,
and the Bribery
and Conspiracy Statutes
of the
United States of America

The Integrity and Conscience of the Delegates to the Republican Convention of August, 1972 require that the Platform be amended to prevent a repetition of the fraud practiced upon Governors Reagan, Rockefeller, Romney and the other candidates for President by Richard M. Nixon at the August, 1968 Convention.

By Randolph Phillips, *Chairman*
The National Committee for Impeachment

Robert L. Bobrick, *General Counsel,*
Member of the Bar
of the Supreme Court of the
United States

Vern Countryman, *Professor of Law,*
Harvard University
Member of the Bar, Supreme Court of
The United States

FRANCIS E. WALTER, M. C.
15TH DISTRICT, PENNSYLVANIA

RUTH MISELL, AD. ASSISTANT
HELEN GUTTON, EXECUTIVE SECY.
SARA BONNER, CLERK
CHARLES BRUSH, CLERK
MARGARET BLUNT, CLERK

Congress of the United States
House of Representatives
Washington, D. C.

CHAIRMAN
COMMITTEE ON UNAMERICAN
ACTIVITIES
SUBCOMMITTEE ON IMMIGRATION
MEMBER
JUDICIARY COMMITTEE
JOINT COMMITTEE ON IMMIGRATION
AND NATURALIZATION POLICY
U. S. DELEGATE, INTERGOVERNMENTAL
COMMITTEE ON EUROPEAN IMMIGRATION

11a

January 18, 1960

Honorable Edward N. Gadsby
Chairman
Securities and Exchange Commission
Washington 25, D. C.

Dear Mr. Gadsby:

The House Judiciary subcommittee, of which I am Chairman, has been asked to investigate the administrative supervision by the SEC of the 1958 proxy contest in which over 20,000 stockholders of the Pennsylvania Railroad Company voted to elect Mr. Randolph Phillips as the first minority director in the Company's history. The Company contended that it had lawfully secured a sufficient number of revocations of Mr. Phillips' proxies to defeat him, and the District Court for the Eastern District of Pennsylvania, in an opinion reported in 166 F. Supp. 353, upheld that contention. Thereafter, the Circuit Court of Appeals for the Third Circuit declined to review the case on its merits on the ground that Mr. Phillips and his associated stockholders had no standing in equity because Mr. Phillips, in sending a telegram to two Swiss banks, had committed a deliberate and malicious violation of your proxy rules. The telegrams were intended to prevent the banks from voting shares registered in their names, if in fact owned by others and if the banks had no authority to vote them from the true owners. A petition for a writ of certiorari was denied last year by the Supreme Court.

The denial of the review by the Circuit Court seems to have been clearly based on the violation of your proxy rules. The record shows that the Courts relied on the opinion of your staff in making their findings.

Proxy Rule X-11a-2(a) excepts from the operation of the proxy rules "Any solicitation made otherwise than on behalf of the management of the issuer where the total number of persons solicited is not more than ten." 17 C.F.R. #240, 11a-2(a).

The violation charged by the Commission, as stated above, consisted of sending a telegram to the two banks. The above exception would seem to support Mr. Phillips view that he had not

January 18, 1960

acted in violation of the SEC proxy rules. I understand, however, that the view of your legal staff was that the exception 12a did not apply because Mr. Phillips had already solicited the proxies of more than ten persons, though in a different communication.

The language of the rule is, in my opinion, at least ambiguous and it would appear that Mr. Phillips' interpretation could very well have been made in good faith. In the circumstances the finding that a deliberate and malicious violation of the rules had taken place would seem difficult to justify.

Will you kindly advise me whether prior to the ruling in this case there existed any reported judicial or administrative ruling or precedent for applying the rule in the manner done by your staff. I would appreciate any citations if they exist.

I might note that if no such reported precedents were in existence, it could fairly be argued that the silence of your staff on this point could have misled the courts into their finding that a deliberate and malicious violation of the Commission's rules had been committed.

I also note that the SEC proxy rules apply only to solicitations of "security holders". The Swiss banks appear to have been neither the owners nor the holders of the shares in question, but merely registered nominees for shares which circulate in bearer form. I find it difficult to think of the banks as "security holders" within the sense and context of the proxy rules, or of attempts to prevent their voting shares without authority as proxy solicitations. However, I would appreciate knowing if it is the Commission's view that the banks, rather than the persons in actual possession and ownership of the shares, were "security holders" within the meaning of the statutes and rules administered by it. Any past holdings to that effect by the Commission in similar situations would, of course, be of interest to me.

As you probably know, Mr. Phillips was responsible some years ago for calling the attention of Congress to the need for a legislative investigation of the SEC, in particular with respect to its handling of the reorganization of the United Corporation. It is equally important to Congress and the administrative agencies that there should be no hint of reprisal by the agencies of their staffs against persons who may have caused the actions of any agency to be subjected to legislative scrutiny.

I shall appreciate your comments before taking any steps to place this matter before the Subcommittee.

Very truly yours,

Francis B. Walter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

74 Civil 5740 (RJW)

-against-

AMENDED
COMPLAINT

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own capacity
as directors of Alleghany Corporation, and
as attorney for and guardians of the property
of Allan P. Kirby, Sr.; JOHN J. BURNS, JR.,
RALPH K. GOTTSHALL; RICHARD R. HOUGH;
WILLIAM G. RABE, CLIFFORD H. RAMSDELL,
and CARLOS J. ROUTH, as directors of
ALLEGHANY CORPORATION, and ALLEGHANY
CORPORATION,

Defendants.

Randolph Phillips, for his Amended Complaint herein, alleges on
information and belief, except paragraph 2 which he alleges on knowledge:

COUNT ONE

1. This Court has jurisdiction over the matters alleged herein
under the Interstate Commerce Act (49 U.S.C.A. § 5 et seq.), the
Investment Company Act of 1940 (15 U.S.C.A. § 80a et seq.) and the
Securities Exchange Act of 1934 (15 U.S.C.A. § 78aa et seq.) The
amount in controversy, exclusive of interest and costs, exceeds \$10,000.00.
2. Plaintiff Randolph Phillips is the beneficial owner of shares
of common stock of defendant Alleghany Corporation and has been such
a stockholder prior to the acts complained of and continuously to date.
He brings this action derivatively on behalf of defendant Alleghany Corp-
oration and representatively on behalf of himself and all holders of the
common stock of Alleghany Corporation similarly situated.
3. At the time of the acts complained of defendant Alleghany
was subject to regulation under the Interstate Commerce Act and was

4. At the time of the acts complained of Allan P. Kirby, Sr., now deceased, was the beneficial owner of 4,084,813 shares, or 56.21% of the outstanding common stock of Alleghany Corporation, and by reason thereof controlled defendant Alleghany Corporation and its subsidiary companies, including Investors Diversified Services, Inc. (hereinafter referred to as IDS).

5. At the time of the acts complained of Alleghany Corporation was and is to date the controlling stockholder of IDS, the investment adviser for a group of mutual funds, including Investors Variable Payment Fund, Inc., Investors Stock Fund, Inc. and Investors Mutual, Inc.

6. Each of said mutual funds were, like Alleghany Corporation, at the time of the acts complained of, registered investment companies with the S.E.C., pursuant to the Investment Company Act of 1940.

7. On June 30, 1967 Allan P. Kirby, Sr., as a result of an incurable stroke, was judicially declared to be mentally incompetent to manage his affairs and his sons defendants Fred M. Kirby and Allan P. Kirby, Jr. were appointed as guardians of the property of Allan P. Kirby, Sr. by the Probate Division of the Morris County Court of Morristown, N.J., and thereby succeeded to the stock control of Alleghany Corporation and through it of IDS and of its management of said mutual fund companies.

8. Defendant Fred M. Kirby at the time of the acts complained of and to date has been Chairman, President and Chief Executive Officer of Alleghany and Chairman of the Board of Directors of IDS; and defendant Allan P. Kirby, Jr. has been a director of Alleghany and Chairman of the Executive Committee of the Board of Directors of IDS.

9. At the time of the acts complained of defendants Fred M. Kirby, Allan P. Kirby, Jr., John J. Burns, Jr., Ralph K. Gottshall, William G. Rabe, Clifford H. Ramsdell, Carlos J. Routh and John E. Tobin were each and are today (except defendant Ramsdell) directors of defendant Alleghany Corporation and constituted 8 of the 12 directors of the company in 1969 and 8 of the 9 directors in 1970 and with defendant Richard R. Hough 9 of the 10 directors in 1971.

10. On February 1, 1968 the merger of the Pennsylvania Railroad Company with the New York Central Railway Company became effective, and as a result defendant Alleghany Corporation became the owner of 196,195 shares of the capital stock of the Penn Central Company.

11. As a result of said merger defendant Alleghany Corporation ceased to exercise control of the New York Central Railroad Company and thus was no longer entitled to the protective jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act, which it had employed to protect its operations and as a shield from more rigorous regulation by the Securities and Exchange Commission under the Investment Company Act of 1940.

12. On April 10, 1968 defendant Alleghany Corporation registered as an investment company with the Securities and Exchange Commission under the Investment Company Act of 1940.

13. Section 14. (a) of the Securities Exchange Act of 1934 and Section 20. (a) of the Investment Company Act of 1934 make it unlawful for any person, by the use of the mails, in contravention of the rules and regulations of the Securities and Exchange Commission, to solicit proxies in respect to any security registered pursuant to said statutes, including those of the common stock of defendant Alleghany Corporation.

14. On or about August 1, 1968, and to at least August, 1970, defendant John E. Tobin, as chief counsel for defendant Alleghany Corporation and as personal counsel for the Kirby family in matters relating to said corporation conspired with defendants Kirby and Burns to deprive the minority shareholders of Alleghany Corporation, including plaintiff herein, of the right to have the management of the corporation exercised in the best interest of all the common stockholders and instead to use its assets and legal facilities in the personal interest of the Kirby family and defendant Tobin, in violation of said federal statutes.

15. Pursuant to said conspiracy, defendant Tobin originated with defendants Kirby and Burns a plan to deprive the minority stockholders of Alleghany of the right to the payment of substantial dividends by reason of the fact that Alleghany had become a personal holding company of the Kirby family and of the right to the protection of the Securities and Exchange Commission under the Investment Company Act of 1940, and to eliminate the risk to the Kirby family of liability for the payment of substantial federal income taxes by reason of the fact that Alleghany Corporation had become a personal holding company of the Kirby family.

16. Pursuant to said plan, defendant Tobin as Chief Counsel for Alleghany, caused it to engage in a series of transactions between September 1968 and January 1970 in violation, as thereafter found by the Interstate Commerce Commission, of Section 5(4) of the Interstate Commerce Act. (Alleghany Corporation - Control and Purchase - Jones Motor Co., Inc. - And Control Erie Trucking Co., 100 M. C. C. 333, 352, 353, 356-357, Report of the Commission decided January 27, 1970.) Said report conditionally approved said control and purchase transactions but did not make their consummation mandatory. It stated:

There can be no doubt that there was a statutory violation. In acquiring the outstanding stock of Jones and Erie without prior Commission approval, Alleghany violated the provisions of section 5(4) of the act. In an attempt to insulate itself from Jones' operations and thereby avoid the continuing violation of the statute, Alleghany immediately placed legal ownership and management responsibility for the carriers in the hands of Marine Midland. The trust so created was drafted in terms obviously designed to meet the requirements for independent voting trusts heretofore approved by the Commission in proceedings with similar factual situations. See *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279, 319.

The Commission does not view with favor the purchase of control and then placing the stock in trust. This practice is contrary to the intent of the statute in that the statute envisions approval of control by the Commission before and not after the purchase of control. The provisions of section 5 were not written by the Congress to be circumvented by carriers eager not to lose a good "deal," and those who do so flout the intent of Congress and impede the Commission in the discharge of its duties under the law. The purchase of control without prior Commission approval, even if the stock is placed in trust, constitutes a violation of the law and as such placed in serious question the fitness of Alleghany as a carrier. We made clear in our recent decision in *East Texas Motor Frt.—Control—Consolidated*, 109 M.C.C. 213, that actions similar to those taken here would not be condoned in the future. We again repeat the admonition stated therein that there is no excuse for violating the act to consummate a transaction.

In the past it has appeared Alleghany desired to use this Commission as a shelter to protect itself from the harshness of regulation of other agencies and it indeed admits that its purpose in being before the Commission here is at least in part to find such protection. The Interstate Commerce Act was not passed to provide a safe harbor from the other agencies of the Federal and State governments. Its purpose, as stated in the national transportation policy, was:

to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers***.

If regulation under the act results in leniency toward certain activities of carriers, it is because such leniency fosters the more important goals stated above. Alleghany will in the future be subject to the same type of regulation as other carriers. However, it is not to be expected that it will be protected from the regulation of any other agency to the extent the law may permit that agency to exercise concurrent jurisdiction over it.

17. Commissioner Stafford, though dissenting from the result, 18a
concurred in the finding of a violation of Section 5(4), stating

"Alleghany is presently subject to partial regulation by the Commission and it is inconceivable to me that its officers and counsel did not know of the requirements of Section 5." (109 M. C. C. at 357).

18. Under date of April 1, 1969 defendant Tobin caused Alleghany Corporation to circulate to its common stockholders a proxy statement which he had prepared for the Annual Meeting of Shareowners to be held on April 25, 1969, for the purpose among others "2. To consider and take action upon a proposal to authorize the Corporation to cease to be an investment company for purposes of the Investment Company Act of 1940." and "3. To consider and take action upon a proposal to amend Article 2, THIRD, of the Corporation's Articles of Restatement of Charter to permit the Corporation to engage in business as a common carrier."

19. The basis for the aforesaid acts (2) and (3) was the illegal acquisition and control of the Jones Motor Co., Inc. and its proposed merger into a wholly-owned and newly created subsidiary of Alleghany called Alleghany Trucking Co., Inc.

20. At no time did defendant Tobin either as chief counsel for Alleghany nor as a director thereof disclose to the common stockholders in said proxy statement or otherwise that the acquisition of the ownership and control by Alleghany of Jones Motor Co., Inc. was in violation of the Interstate Commerce Act, although he well knew that such was the fact, or as an attorney should have so known.

21. Nor did defendant Tobin disclose to the common stockholders in said proxy statement or otherwise that the liability of Alleghany Corporation if the aforesaid transactions were not approved by the

stockholders, to be taxed as a personal holding company of the Kirby family could be eliminated by distributing all such personal holding company income as dividends to its common stockholders.

22. Defendant Tobin thereby concealed also his conflict of interest as attorney for the Kirby family and as attorney for the Alleghany Corporation whose minority stockholders were not in the same tax bracket as the Kirby family with its reputed wealth of some \$300 million.

23. In furtherance of said conspiracy defendant Tobin falsely and fraudulently represented in said proxy statement dated April 1, 1969 that "Pursuant to orders of the ICC, the (Alleghany) Corporation has deposited all of its Jones Motor stock with an independent voting trustee."

24. Said "orders", as attorney Tobin well knew, were non-existent.

25. At no time after the Interstate Commerce Commission in its aforesaid Report dated January 27, 1970 declared that the aforesaid Jones Motor Company transactions violated Section 5(4) of the Interstate Commerce Act, did defendant Tobin cause defendant Alleghany Corporation so to advise the stockholders of Alleghany Corporation in the proxy statement for the April, 1970 annual meeting or otherwise.

26. At no time did defendant Tobin nor defendant directors nor defendant Alleghany Corporation disclose to the ICC while said applications respecting the Jones Motor Company transactions were pending before it that the approval of the Alleghany stockholders of the transactions set forth in the April 1, 1969 proxy statement had been procured by the aforesaid false statement and material omissions in violation of the proxy rules of the SEC under said federal statutes.

27. Based on the alleged vote of approval of the aforesaid transactions by the stockholders of Alleghany Corporation pursuant to said proxy statement dated April 1, 1969 at their annual meeting of April 25, 1969, which had been fraudulently procured, and on the said Report of the ICC, which also had been fraudulently procured, defendant

Tobin caused defendant Alleghany Corporation to file on May 22, 1970 an application with the SEC, allegedly pursuant to Section 8(f) of the Investment Company Act of 1940, for an order declaring that Alleghany had ceased to be an investment company and that its registration had ceased to be in effect.

28. By order dated August 21, 1970 the SEC granted said application of defendant Alleghany Corporation under Section 8(f) of the Investment Company Act.

29. At the time of said action by the SEC its Chairman was Hamer H. Budge.

30. Prior to August 21, 1970 SEC Chairman Budge had received an offer from the mutual fund companies for which IDS, under Alleghany control was investment adviser, to serve as President and Chief Executive Officer of said mutual fund companies, and as a result of said offer Budge failed to cause the SEC to make, as was his sworn duty and obligation, a proper investigation and determination of the basis for and legal justification of said Alleghany application under Section 8(f) of the Investment Company Act of 1940.

31. The aforesaid acts of defendant Tobin and defendant Alleghany and Budge fraudulently deprived plaintiff and the common stockholders of Alleghany of the privileges and protection of the Investment Company Act of 1940, from August 21, 1970 to date, and were in violation of s 14(a) of the Securities Exchange Act of 1934 and ss 1(b)(1) and (2), 3(b), 9(b)(1), 13(a), 17(a), and 20(a) of the Investment Company Act of 1940, and SEC proxy rule 14a-9, and also violated s 5(4) of the Interstate Commerce Act, and said false statement and omitted statements were material to the representations in said proxy statement and said proxy solicitation was an essential link in the accomplishment of the transactions in question.

COUNT TWO

21a

32. Plaintiff repeats with the same force and effect as if separately re-alleged herein each allegation above set forth.

33. For his services in originating, participating in and consummating the aforesaid conspiracy and illegal acts, defendant Tobin was paid in 1970 by defendant Alleghany Corporation in the guise of legal fees paid to the law firm of Donovan, Leisure, Newton & Irvine, of which he is and was a partner at the time of the aforesaid acts, an estimated sum of \$400,000, in violation of Section 36 of the Investment Company Act.

34. The excess of cost over the fair value of Jones Motor assets at the date it was acquired was \$6,336,203, said excess representing the price defendants caused Alleghany Corporation to pay to obtain the jurisdiction of the Interstate Commerce Commission and to solve the personal holding company tax problems of the Kirby family by the aforesaid acts in violation of the Interstate Commerce Act and the proxy rules and regulations of the Securities and Exchange Commission, and in order that defendants Tobin and Kirby might consummate the aforesaid conspiracy.

35. At the time of the consummation of the aforesaid Jones Motor company transactions in 1970 said company was operating at a loss, and the loss for the year 1970 was \$2,239,330 before taxes.

36. At no time prior to the date of April 30, 1970, when defendant Alleghany Corporation consummated the transactions permitted by the ICC order of January 27, 1970, did defendants seek to re-negotiate upon behalf of defendant Alleghany the terms under which it had purchased the stock of Jones Motor Co. in 1968, despite the fact that the ICC by

its Report of January 27, 1970 had declared said acquisition a violation of the Interstate Commerce Act and despite the aforesaid loss that was accruing to Alleghany Corporation in 1970.

22a

37. The aforesaid acts violated ss 8, 17, 36 and 37 of the Investment Company Act of 1940 and damaged Alleghany by an amount totaling at least \$8,575,588.

38. One or more of the aforesaid acts occurred within the Southern District of New York.

39. This action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

40. A demand upon the Board of Directors of defendant Alleghany Corporation to bring this action would be futile, since a majority of the members of said Board are named as defendants herein and participated in the acts complained of and are nominees of the defendant Kirby family which controls the corporation.

41. A demand upon the shareholders of defendant Alleghany Corporation to bring this action would be futile since the defendants Kirby own and control more than 50% of the common stock of the corporation.

COUNT THREE

42. Plaintiff repeats with the same force and effect as if separately recited herein each and every one of the above allegations.

43. Defendants Tobin and Kirby caused Alleghany Corporation to represent in said April 1, 1969 Proxy Statement that

"Termination of the Corporation's status under the (Investment Company) Act would, in the opinion of the management, afford the Corporation flexibility in a number of areas not now available because of the limitations and restrictions imposed by the Act." (p. 6)

44. The Report of the ICC in 109 M. C. C. decided January 27, 1970 disclosed that

"It is readily admitted (by Alleghany Corporation) the original intention in acquiring Jones was to avoid classification as a personal holding company under the Internal Revenue Code and thus to conserve funds which would otherwise have to be paid under the penalty tax provision." (109 M. C. C. 342)

45. The stockholders of Alleghany Corporation were not told that in voting for proposals 2 and 3 at the 1969 annual meeting they would be denying to themselves a solution of the personal holding company tax problem that would result in the distribution of all that company's income as dividends to themselves.

46. The minority stockholders of Alleghany were not told that \$13,560,177 of its funds were being used to solve the personal holding company tax problem of the Kirby family and that the Kirbys had in that respect a conflict of interest with the minority stockholders in that the Kirbys did not desire increased dividends because of the punitive tax to be paid thereon for persons in their tax bracket while the minority shareholders were not in such a tax bracket as a group as to make a tax on increased dividends punitive to them.

47. The price of \$13,560,177 for the Jones stock was not reached by arms'-length bargaining by Alleghany, said defendants' business judgment being impaired by the aforesaid tax objectives of the Kirbys, and said price being more than \$6 million in excess of the fair value of the Jones assets; nor was it reached by objective market judgment.

48. The aforesaid false statement and fraudulent omission by defendants Tobin and defendant directors in the proxy statement dated April 1, 1969 were material, and without the proxies received pursuant to said statement defendants would not have received sufficient votes to authorize the action at said annual meeting of Alleghany Corporation on April 25, 1969 set forth as items 2 and 3 in paragraph 18 above.

49. Defendants Tobin, Kirby and Burns, in violation of Rule 10b-5(1), promulgated by the Securities and Exchange Commission pursuant to Section 10 (b) of the Securities Exchange Act of 1934, directly or indirectly by the use of the mails and other instrumentalities of interstate commerce and in connection with the aforesaid purchase by Alleghany Corporation of the stock of the Jones Motor Company, employed the device, scheme or artifice of soliciting proxies from the stockholders of Alleghany Corporation to approve said purchase directly or indirectly at the April 25, 1969 annual meeting by means of the false and misleading proxy statement dated April 1, 1969, to defraud Alleghany Corporation into paying \$13,500,177 to avoid Alleghany being classified as a personal holding company of the Kirby family.

50. In so doing and in violation of Rule 10b-5 (2), promulgated by the Securities and Exchange Commission pursuant to Section 10 (b) of the Securities Exchange Act of 1934, said defendants made in said proxy statement in order to procure the vote of the Alleghany stockholders in approval of said stock purchase and related matters, the false and material statement that "Pursuant to orders of the ICC, the (Alleghany) Corporation has deposited all of its Jones Motor stock with an independent voting trustee," when Tobin knew said orders did not exist and while concealing the fact that said purchase had been made in violation of the Interstate Commerce Act, and thereafter continued to omit to state to the Alleghany stockholders the material facts necessary in order to make those statements, in the light of the circumstances under which they were made, not misleading, and by such misleading means causing the stockholders of Alleghany to approve directly or

indirectly the payment by Alleghany \$6,336,203 for said stock, representing the excess of cost over the fair market value of the Jones Motor assets at the date it was acquired.

51. While representing in said proxy statement that the Jones Motor transaction "should also eliminate any possibility of the (Alleghany) Corporation being subject to Federal income taxes at personal holding company rates." (p. 6), defendants Tobin and Kirby omitted to state that this liability had been created by the Kirby family's increasing their ownership of Alleghany common stock to more than 50% of the total outstanding and that the liability so created by the Kirby family could be eliminated by the distribution to the Alleghany shareholders in the form of dividends of all the holding company's income.

52. Each of the aforesaid acts of defendants Tobin, Kirby and Burns was an act, practice, or course of business which operated as a fraud or deceit upon Alleghany Corporation and its minority shareholders and damaged them by resulting in the payment of the sum of \$6,336,203 in excess of cost over the fair value of the Jones Motor assets in order to obtain the aforesaid personal tax objectives of defendants Kirby and were in violation of Rule 10b-5 (3) promulgated by the Securities and Exchange Commission under Section 10 (b) of the Securities Exchange Act of 1934.

53. In addition, the Alleghany common stockholders have been damaged by defendants' failure to cause the corporation to pay adequate dividends in order to minimize the defendant Kirby family's tax burden.

54. Except for the above acts Alleghany would today be a regulated investment company under the Investment Company Act and entitled to make distributions of all of its earned and capital gain income without being subject to tax thereon, a right of which it has been deprived by the above fraudulent acts.

COUNT FOUR

25a

55. Plaintiff repeats with the same force and effect as if separately realleged herein each and every paragraph numbered 1 through 54 under Counts I and II above.

56. As of August 1, 1968 defendant Alleghany Corporation and the aforesaid IDS investment companies managed by IDS under Alleghany control owned the following number of shares of the capital stock of the Penn Central Company:

| <u>Name of registered investment company</u> | <u>Number of shares of Penn Central capital stock</u> |
|--|---|
| Alleghany Corporation | 196,195 |
| Investors Mutual, Inc. | 500,000 |
| Investors Stock Fund, Inc. | 320,000 |
| Investors Variable Payment Fund, Inc. | 200,000 |

57. From February 1968 through March 25, 1970 defendants Fred Kirby, Routh, Allan P. Kirby, Jr. and Gottshall together with Daniel E. Taylor and Andrew Van Pelt, the latter two not being named as defendants herein, were each members of the Board of Directors of Penn Central Company or of its subsidiary companies, and as such represented defendant Alleghany Corporation as the owner of the aforesaid 196,195 shares of Penn Central capital stock.

58. Said defendant directors and directors Taylor (now deceased) and Van Pelt at the time the aforesaid application was pending before the ICC with respect to the acquisition of ownership and control of Jones Motor Co. stock knew of the deteriorating financial condition of the Penn Central system and of the improper management of its finances but nevertheless failed to disclose and concealed said facts from the ICC, although knowing full well that these facts and the facts alleged in Counts I and II above, were material and relevant to the ICC's consideration of said Alleghany application and its fitness to be a carrier in the public interest, including that of its shareholders.

59. On March 27, 1969 because of the investment advice of ILS, then and now under Alleghany control, and the deteriorating financial condition of Penn Central and the fact that it was no longer suitable as an investment by a registered investment company, Investors Stock Fund, Inc. proceeded to sell its 320,000 shares of Penn Central stock, completing said sales on May 21, 1969, and receiving total proceeds of \$17,480,178.27 or an average price per share of \$54.62.

60. On April 10, 1969 because of the investment advice of IDS, then and now under Alleghany control, and the deteriorating financial condition of Penn Central and the fact that it was no longer suitable as an investment by a registered investment company, Investors Variable Payment Fund, Inc. proceeded to sell its 200,000 shares of Penn Central stock, completing said sales on May 28, 1969, and receiving total proceeds of \$10,681,578.21 or an average price per share of \$53.40.

61. On June 13, 1969 because of the investment advice of IDS, then and now under Alleghany control, and the deteriorating financial condition of Penn Central and the fact that it was no longer suitable as an investment by a registered investment company, Investors Mutual, Inc. proceeded to sell 500,000 shares of Penn Central stock, completing said sales on May 27, 1970, after being interrupted in the act of so doing by defendant Fred M. Kirby, and receiving total proceeds of \$13,477,486.07 or an average price per share of \$26.95.

62. Defendant directors of Alleghany Corporation Fred M. Kirby, Chairman of the Board of Directors of IDS, and Allan P. Kirby, Jr., Chairman of the Executive Committee of the Board of Directors of IDS, although knowing of the aforesaid IDS advice, failed

to disclose said advice to the other directors of Alleghany or if they so disclosed failed to cause Alleghany Corporation as a registered investment company to act thereupon, diligently, timely and prudently. 28a

63. Defendants knew or ought to have known that the capital stock of the Penn Central Company was no longer a proper investment for a company registered under the Investment Company Act, as of March 27, 1969, when Investors Stock Fund, Inc. began the sale of its shares.

64. Defendants Kirby and the 4 other Alleghany directors who interlocked with the boards of Penn Central or its subsidiary companies knew full well that Alleghany's holdings of Penn Central were the basis for their 6 Board seats, and that they would lose the prestige of holding these seats on the Boards of Directors of the world's largest transportation system if they caused Alleghany to sell its 196,195 shares of Penn Central capital stock in 1969 when the 3 IDS investment companies were selling their Penn Central shares.

65. In addition defendant John E. Tobin, as Alleghany's chief counsel, desired to retain said Penn Central shares as part of the conspiracy hereinabove set forth and because he knew that if the ICC rejected the application to acquire the shares of Jones Motor Co. there would be no other basis for continuing the jurisdiction of the ICC over Alleghany except its ownership of the Penn Central shares and the resulting interlocking Boards of Directors.

66. The continuous deterioration of the market value of Penn Central's capital stock from a high of \$36 a share in 1968 to \$55 1/3 per share on March 27, 1969, when Investors Stock Fund, Inc., pursuant to investment advice by IDS under Alleghany control, began to sell its Penn Central shares, was known to or should have been known to defendant Alleghany directors.

67. Similarly the fact that Investors Variable Payment, Inc. had started to sell its Penn Central stock on April 10, 1969 when its price was \$55.38 per share was known to or should have been known by defendant directors.

68. Similarly the fact that Investors Mutual, Inc. had started to sell its Penn Central stock on June 13, 1969 when its price was \$50 per share was known to or should have been known by defendant directors.

69. That the financial condition of the Penn Central Company was steadily and progressively deteriorating during 1969 was known or should have been known by defendant Alleghany directors.

70. Said defendant directors knew or should have known by June 13, 1969 that the capital stock of the Penn Central Company no longer qualified as a suitable investment for a registered investment company under the Investment Company Act of 1940.

71. From February, 1968 until some time in 1971 defendants Fred M. Kirby and Allan P. Kirby, Jr. as guardians of the property of Allan P. Kirby, Sr. held 390,130 shares or 1.62 percent of the outstanding Penn Central shares. Said shares combined with Alleghany's shares constituted 2.43 percent of the total Penn Central shares and made the Kirby interests directly and through Alleghany the second largest holders of Penn Central and thus made them one of the dominant interests on the Board of Directors of Penn Central, a position they would lose if they caused Alleghany to sell its shares since that sale would remove the basis for the aforesaid 6 Board seats. Said sale would also remove the basis for an additional 5 seats on the Board of Penn Central or its subsidiaries held by persons originally nominated by Alleghany and the Kirby interests as a result of the latter's control of New York Central.

72. Said defendants Kirby also knew that the sale of the Investors Mutual shares which defendant Kirby sought to interrupt after July 17, 1969 and the sale of Alleghany's holdings would, if it became known in Wall Street, have an accelerating effect on the declining market price of said shares, to the disadvantage of defendant Kirby's family holdings in said stock and to said family's desire to retain said shares.

73. By reason of the aforesaid facts the defendant Kirbys as directors of defendant Alleghany did not have undivided loyalty with respect to the issue of whether or not Alleghany should sell its shares, and caused it to retain its Penn Central shares until the Penn Central was on the verge of filing a petition in bankruptcy on June 21, 1970 and thereafter.

74. As Penn Central Company neared its June 21, 1970 admission of bankruptcy defendants Kirby in panic caused Alleghany to make its first sale of Penn Central capital stock, unloading a total of 96,000 shares between May 27 and May 29, 1970 at an average price of less than \$13 per share.

75. Said sales were made in competition with the sale of 241,000 shares of Penn Central stock being dumped on the market that same week by Investors Mutual, Inc.

76. Following the filing of the bankruptcy petition of the Penn Central on June 21, 1970, defendant directors caused Alleghany to sell in January, 1971 its remaining holdings of 100,195 Penn Central shares at the bankruptcy price of less than \$6 per share.

77. As a result of the aforesaid imprudence and delay of sale of Alleghany's Penn Central shares by defendant directors and the conflict of interest of the 6 Alleghany directors who were members of the board of directors of the Penn Central Companies, defendant

Alleghany received a total price of only \$1,851,392 for its 196,195 shares of Penn Central capital stock, or an average price of only roundly \$9 per share, whereas if said defendants had timely, prudently and without conflict-of-interest discharged their fiduciary duty to Alleghany and its shareholders said shares could have been sold at the same average price obtained by Investors Stock Fund, Inc. of \$54.62 per share or by Investors Variable Payment Fund, Inc. or \$53.40 per share.

78. Even by acting as belatedly as the first week in January 1970 defendant directors could have obtained for Alleghany a market price of \$35 per share, but continuing their imprudence and breach of trust they failed so to do.

79. The aforesaid acts of defendant directors resulting in the failure to sell said Penn Central shares as aforesaid in 1969 damaged Alleghany in the amount of \$8,546,943, measured by the price it would have received of \$10,398,335 and the price it did receive of only \$1,851,392 for its 196,195 shares when it finally sold said shares in 1970 and 1971.

80. The aforesaid acts of defendant directors resulting in the failure to sell Penn Central shares in the first week of January, 1970 damaged Alleghany in the amount of \$5,015,433, measured by the price it would have received of \$6,366,825 and the price it did receive of only \$1,851,392 for the 196,195 shares when it finally sold said shares in 1970 and 1971.

81. The aforesaid acts of said defendants Tobin, Kirby and the other defendant Alleghany directors from March 1969 through August 21, 1970 constituted a continuing course of gross negligence and gross abuse of trust in violation of Section 36 of the Investment Company Act of 1940 and in reckless disregard of their duties as directors of a registered investment company.

32a

82. The facts showing the aforesaid violations were concealed from the shareholders of Alleghany and not disclosed to them at any time, except that the sale by the company of said Penn Central shares were disclosed for the first time in the Annual Report for 1970 mailed to the shareholders under date of March 18, 1971 and the Annual Report for 1971 mailed to the shareholders on March 15, 1972.

COUNT FIVE

83. Plaintiff repeats with the same force and effect as if separately realleged herein each of the above allegations in paragraphs 1 through 82.

84. Defendant directors Burns, Gottshall, Allan P. Kirby, Jr., Fred M. Kirby, William G. Rabe, Carlos J. Routh and John E. Tobin, and Alleghany directors Hill, Hunt, Ramsdell, Taylor and Van Pelt obtained their re-election as directors of Alleghany Corporation at the annual meeting of April 25, 1969 in part by proxies solicited through the use of the mails pursuant to the proxy statement dated April 1, 1969.

85. Said statement implicitly represented, as also did the reports of the company sent through the mails to its stockholders and to the Securities and Exchange Commission, that said directors were discharging and would discharge their fiduciary duties to the Corporation and to the shareholders in a manner free of conflict of interest and with disinterested business judgment, when as defendant

directors well knew, this was not true with respect to the decisions of the Board of Directors respecting whether or not to sell in 1969 the Corporation's holdings of 196,195 shares of the capital stock of the Penn Central Company.

86. Said April 1969 proxy statement and the annual report of Alleghany for 1968, sent through the mails in March 1969 and the other reports of the company to the stockholders and the S. E. C. in 1969 failed to disclose the Kirby family holdings of 390,130 shares of the Penn Central stock and the fact that 6 of the 12 Alleghany directors were also directors of Penn Central or its subsidiary companies.

87. Throughout the year 1969 there existed a conflict of interest between the Kirbys and the interlocked Penn Central directors with their desire to retain said board seats, using Alleghany's shareholdings in support thereof, and their duties and obligations as directors of Alleghany, as a registered investment company.

88. Said conflict further arose from the fact that the Kirby family did not desire in 1969 to sell its Penn Central holdings, while it was the duty and obligation of defendant directors of Alleghany as a registered investment company to cause it to sell its 196,195 shares of Penn Central in view of the continuing declining market for said shares and their fiduciary obligation of diligence and prudence in conserving its asset values.

89. As a result of said conflict of interest defendant directors failed to cause Alleghany Corporation to sell in 1969 its 196,195 shares of Penn Central, although knowing full well that IDS under its control had caused the aforesaid 3 IDS funds to sell their Penn Central shares for the reason they were no longer suitable investments for a registered investment company; and Alleghany thereafter sold said shares over the New York Stock Exchange in 1970 and 1971 at a loss of \$1,851,126.

90. The acts hereinabove alleged in COUNT THREE and in this Count constituted a course of business which operated as a fraud or deceit upon Alleghany Corporation and its shareholders, in violation of Rule 10b-5 (3) promulgated by the Securities and Exchange Commission under Section 10(b) of the Securities Exchange Act of 1934.

91. The aforesaid acts damaged Alleghany Corporation in the amount of \$3,000,000, or more.

COUNT SIX

92. Plaintiff repeats with the same force and effect as if separately alleged herein each and every allegation in paragraphs 1 through 91.

93. Plaintiff alleges this Count in his own right individually as a stockholder of Alleghany Corporation and on behalf of all stockholders similarly situated.

94. Defendant Alleghany Corporation is not and has not been since April 1968 a company subject to regulation under the Interstate Commerce Act.

95. Section 3(c)(9) of the Investment Company Act of 1940 provides in pertinent part that "any company subject to regulation under the Interstate Commerce Act" is excluded from the definition of an investment company and thus not subject to regulation of the Securities and Exchange Commission under the Investment Company Act of 1940.

96. Congress did not intend in the enactment of Section 3(c)(9) that any regulated investment company by the acquisition of the stock and control of a motor carrier company made in violation of the Interstate Commerce Act would be eligible for and could obtain an order under

Section 3(c)(9) or Section 3(f) of the Investment Company Act exempting it from the Act and determining that it had ceased to be an investment company.

35a

97. By reason of the aforesaid facts the order of the Securities and Exchange Commission filed on August 21, 1970 under Section 3(f) of the Investment Company Act, Investment Co. Act Release No. 6168, finding that Alleghany Corporation had ceased to be an investment company and terminating its registration under the Investment Company Act is null and void as a matter of law and was beyond the jurisdiction of the Securities and Exchange Commission to make.

COUNT VII

98. Plaintiff repeats with the same force and effect as if separately set forth herein each and every allegation in paragraphs 1 through 97 of COUNTS I, II, III, IV, V and VI.

99. Plaintiff is a citizen of the State of New York, and defendant Alleghany Corporation is incorporated in the State of Maryland and its principal place of business is Minneapolis, Minnesota.

100. Defendants Tobin, Fred M. Kirby and Allan P. Kirby, Jr. are each citizens of the State of New Jersey.

101. This Count is alleged solely against defendants Alleghany Corporation, Tobin, Fred M. Kirby, and Allan P. Kirby, Jr.

102. The amount in controversy, exclusive of interest and costs, exceeds \$10,000.00.

103. By reason of the aforesaid facts jurisdiction with respect to this Count is founded on diversity of citizenship.

104. The acts alleged in COUNT I above constituted a breach of defendants' fiduciary duties under the common law of Maryland.

36a

105. The acts alleged in COUNT II above constituted a breach of defendants' fiduciary duties under the common law of Maryland.

106. The acts alleged in COUNT III above constituted a breach of defendants' fiduciary duties under the common law of Maryland.

107. The acts alleged in COUNT IV above constituted a breach of defendants' fiduciary duties under the common law of Maryland.

108. The acts alleged in COUNT V above constituted a breach of defendants' fiduciary duties under the common law of Maryland.

109. The acts alleged in COUNT VI above constituted a breach of defendants' fiduciary duties under the common law of Maryland.

110. The aforesaid acts damaged Alleghany Corporation in the manner and amounts set forth in each of the aforesaid Counts.

WHEREFORE, plaintiff prays for judgment as follows:

1. A declaratory judgment that the defendant directors of Alleghany Corporation and John E. Tobin as its attorney violated Rule 14a-3 of the proxy rules of the Securities and Exchange Commission in the solicitation of proxies pursuant to the proxy statement dated April 1, 1969 for the annual meeting of the Corporation's stockholders held on April 25, 1969; and that as a result the resolutions purportedly enacted at that meeting by vote of said proxies authorizing the directors and officers of the Corporation to take all necessary steps to cause the Corporation to cease to be an investment company registered under the Investment Company Act of 1940, and amending the Corporation's Articles of Restatement of Charter to permit the Corporation to engage in business as a common carrier, are null and void.

2. Requiring the individual defendants to account to Alleghany Corporation for the damages of Alleghany Corporation and the profits of any of the said defendants.

3. Requiring the individual defendants to pay over to Alleghany 37a Corporation the amount determined on said accounting.

4. Requiring the individual defendant directors to cause Alleghany Corporation to divest itself of the stock, assets and control of the Jones Motor division.

5. Requiring the individual defendant directors to cause Alleghany Corporation to declare and distribute as dividends all the net income received by it from 1969 to date, the payment of which was prevented by the acts herein complained of.

6. Requiring the individual defendant directors to cause Alleghany Corporation to register with the Securities and Exchange Commission under the Investment Company Act of 1940, and to take all steps necessary to vacate the Report and Order of the Interstate Commerce Commission dated January 27, 1970 and reported in 109 M. C. C. 333.

7. Directing such other and different relief as may be just and equitable.

8. Awarding to plaintiff a reasonable attorney's fee together with the costs and disbursements of this action.

RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N. Y. 10021
212-734-6776

VERIFICATION

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, deposes and says: I am the plaintiff in this action. I have prepared the foregoing complaint. I hereby allege that the contents thereof are true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true.

RP
RANDOLPH PHILLIPS

Affirmed to before me this

66 day of March, 1975.

ANNE KLASS
Notary Public, State of New York
No. 41-87300
Qualified in Queens County
Certificate filed in New York County
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own
capacity as directors of Alleghany
Corporation, and as attorney for and
guardians of the property of Allan P.
Kirby, Sr.; JOHN J. BURNS, JR., RALPH
K. GOTTSHALL, RICHARD R. HOUGH,
WILLIAM G. RABE, CLIFFORD H. RAMSDALL,
and CARLOS J. ROUTH, as directors of
ALLEGHANY CORPORATION, and ALLEGHANY
CORPORATION,

ANSWER OF DEFENDANTS
JOHN E. TOBIN
FRED M. KIRBY
ALLAN P. KIRBY, JR.
AND JOHN J. BURNS,
JR.

74 Civ. 5740
(RJW)

Defendants.

----- x

Defendants JOHN E. TOBIN, FRED M. KIRBY, ALLAN P.
KIRBY, JR. and JOHN J. BURNS, JR., by their attorneys, Debevoise,
Plimpton, Lyons & Gates, for their answer to the amended com-
plaint herein admit, deny and allege as follows:

COUNT ONE

1. Deny each and every allegation contained in para-
graph 1 of the amended complaint, except deny knowledge or
information sufficient to form a belief as to the truth of
the allegation that the amount in controversy, exclusive of
interest and costs, exceeds \$10,000.

2. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 2 of the amended complaint, except admit that plaintiff purports to bring this action derivatively on behalf of Alleghany Corporation ("Alleghany") and in a representative capacity on behalf of himself and all holders of the common stock of Alleghany similarly situated; and allege that the action may not so be maintained because the requirements of Rules 23 and 23.1 of the Federal Rules of Civil Procedure and Rule 11A of the Civil Rules of the United States District Court for the Southern District of New York are not satisfied.

3. Deny each and every allegation contained in paragraph 3 of the amended complaint, except admit that (a) at all times from June 5, 1945 to and including the present time, Alleghany has been and remains subject to regulation under the Interstate Commerce Act, and (b) on April 10, 1968 Alleghany filed a notification of registration under the Investment Company Act of 1940 with the Securities and Exchange Commission; and allege that such notification of registration included a disclaimer that Alleghany was an investment company subject to regulation or required to register under the Investment Company Act, and further allege that pursuant to order of the SEC dated August 21, 1970 Alleghany ceased to be registered.

4. Deny each and every allegation contained in paragraph 4 of the amended complaint, except defendants Fred M.

Kirby and Allan P. Kirby, Jr. admit and defendants John E. Tobin and John J. Burns, Jr. admit on information and belief that as of February 28, 1969, Allan P. Kirby, Sr. was the beneficial owner of 4,084,813 shares, or 56.21% of the outstanding common stock of Alleghany, and respectfully refer the Court to the proxy statements and annual reports of Alleghany for a description of the stock held by Allan P. Kirby, Sr. at other times.

5. Admit the allegations contained in paragraph 5 of the amended complaint.

6. Deny each and every allegation contained in paragraph 6 of the amended complaint, except admit that the mutual funds referred to therein were registered as alleged.

7. Deny each and every allegation contained in paragraph 7 of the amended complaint, except defendants Fred M. Kirby and Allan P. Kirby, Jr. admit and defendants John E. Tobin and John J. Burns, Jr. admit on information and belief that (a) on June 30, 1967, pursuant to an order of the Probate Division of the Morris County Court of Morristown, New Jersey, to which the Court is respectfully referred for the true contents thereof, Allan P. Kirby, Sr. was declared incompetent and defendants Fred M. Kirby and Allan P. Kirby, Jr. were appointed as guardians of his property and, (b) as such, they thereafter and until the guardianship was terminated exercised authority with respect to his interests in Alleghany; and allege that since the guardianship has been terminated and the funds disbursed, Fred M.

Kirby and Allan P. Kirby, Jr. are no longer guardians of the property of Allan P. Kirby, Sr. and cannot be sued in such capacity.

8. Responding to paragraph 8 of the amended complaint, admit that Fred M. Kirby and Allan P. Kirby, Jr. have held the following positions since the dates indicated:

| | | |
|---------------------|--|--------------------|
| Fred M. Kirby | Chairman of the Board of Directors of Alleghany | September 14, 1967 |
| | President and Chief Executive Officer of Alleghany | March 19, 1968 |
| | Chairman of the Board of Directors of IDS | January 8, 1965 |
| Allan P. Kirby, Jr. | Director of Alleghany | December 4, 1963 |
| | Chairman of the Executive Committee of the Board of Directors of IDS | January 17, 1968 |

9. Responding to paragraph 9 of the amended complaint, admit that the following persons have served on the Board of Directors of Alleghany at the times indicated:

| | |
|---------------------|--|
| Fred M. Kirby | January 29, 1958 to May 23, 1961 December 4, 1963 to date |
| Allan P. Kirby, Jr. | December 4, 1963 to date |
| John J. Burns, Jr. | April 26, 1968 to date |
| Ralph K. Gottshall | May 12, 1966 to date |
| William G. Rabe | May 13, 1958 to May 23, 1961 December 4, 1963 to date |

| | |
|----------------------|-----------------------------------|
| Clifford H. Ramsdell | May 12, 1966 to December 31, 1972 |
| Carlos J. Routh | January 9, 1968 to date |
| John E. Tobin | April 26, 1968 to date |
| Richard R. Hough | April 23, 1971 to date; |

and further admit that Alleghany had the following number of persons on its Board of Directors at the times indicated:

| | | |
|--------|---|-------------------------------------|
| eleven | - | June 4, 1969 to February 25, 1970 |
| ten | - | February 25, 1970 to March 23, 1970 |
| nine | - | March 23, 1970 to April 23, 1971 |
| ten | - | April 23, 1971 to July 13, 1971. |

10. Admit on information and belief the allegations contained in paragraph 10 of the amended complaint.

11. Deny each and every allegation contained in paragraph 11 of the amended complaint, except admit that, as a result of the merger of the Pennsylvania Railroad Company with the New York Central Railroad Company, Alleghany ceased to control the New York Central Railroad Company.

12. Deny each and every allegation contained in paragraph 12 of the amended complaint, and repeat and reallege the allegations contained in paragraph 3 of this answer.

13. Responding to paragraph 13 of the amended complaint, respectfully refer the Court to the statutes specified for the provisions thereof and deny any allegations contained in paragraph 13 inconsistent with such statutes.

14. Deny each and every allegation contained in paragraph 14 of the amended complaint, and allege that John E. Tobin has not been chief counsel for Alleghany or personal counsel for the Kirby family and cannot be sued in such capacity.

15. Deny each and every allegation contained in paragraph 15 of the amended complaint.

16. Deny each and every allegation contained in paragraph 16 of the amended complaint, and respectfully refer the Court to the Report referred to therein for the true contents thereof.

17. Responding to paragraph 17 of the amended complaint, respectfully refer the Court to the aforesaid Report for the true contents thereof and deny any allegations inconsistent with such contents.

18. Deny each and every allegation contained in paragraph 18 of the amended complaint, except admit that the proxy statement dated April 1, 1969 was sent by Alleghany to its shareholders and respectfully refer the Court thereto for its true contents.

19. Deny each and every allegation contained in paragraph 19 of the amended complaint.

20. Deny each and every allegation contained in paragraph 20 of the amended complaint, except admit that the proxy statement dated April 1, 1969 contained no statement setting forth the information described; and allege that such informa-

tion was not known nor could it have been known at the time, and further allege that there was no obligation to disclose it.

21. Deny each and every allegation contained in paragraph 21 of the amended complaint, except admit that the proxy statement dated April 1, 1969 contained no statement setting forth the information described; and allege that such information was incomplete and misleading, and further allege that there was no obligation to disclose it.

22-24. Deny each and every allegation contained in paragraphs 22 through 24 of the amended complaint.

25. Deny each and every allegation contained in paragraph 25 of the amended complaint, except admit that the proxy statement dated April 2, 1970 contained no statement setting forth the information described; and allege that there was no obligation to disclose such information, and further allege that the Interstate Commerce Commission in its Report dated January 27, 1970 approved the acquisition by Alleghany of Jones Motor Company and found such acquisition to be consistent with the public interest.

26. Deny each and every allegation contained in paragraph 26 of the amended complaint, except admit that the Interstate Commerce Commission was not informed of the assertions therein; and allege that such assertions are inaccurate and untrue, and further allege that the proxy statement dated April 1, 1969 was submitted to the Interstate Commerce Commission.

27. Deny each and every allegation contained in paragraph 27 of the amended complaint, except admit that on May 22, 1970 Alleghany filed an application with the SEC pursuant to Section 8(f) of the Investment Company Act of 1940 for an order declaring that Alleghany had ceased to be an investment company within the meaning of said Act.

28-29. Admit the allegations contained in paragraphs 28 and 29 of the amended complaint.

30. Deny each and every allegation contained in paragraph 30 of the amended complaint, except admit on information and belief that the mutual fund companies for which IDS was investment adviser offered Hamer H. Budge a position as their President and Chief Executive Officer; and allege that neither the answering defendants nor anyone acting on their behalf offered any position to Hamer H. Budge or sought in any way to influence him in the performance of his official duties.

31. Deny each and every allegation contained in paragraph 31 of the amended complaint.

COUNT TWO

32. Responding to paragraph 32 of the amended complaint, repeat and reallege each and every admission, denial and allegation contained in paragraphs 1 through 31 of this answer.

33-34. Deny each and every allegation contained in paragraphs 33 and 34 of the amended complaint.

35. Deny each and every allegation contained in paragraph 35 of the amended complaint, except admit that Jones Motor Company operated at a loss of \$2,239,380 before income taxes in 1970; and allege that the stock of Jones Motor Company was acquired by Alleghany in 1968, a year in which Jones Motor Company operated at a profit before income taxes of \$2,613,249.

36. Deny each and every allegation contained in paragraph 36 of the amended complaint, except admit that at no time after the acquisition by Alleghany of the stock of Jones Motor Company in 1968 did Alleghany or any of the other defendants seek to renegotiate the Jones Motor Company acquisition; and allege that such acquisition was not subject to renegotiation.

37. Deny each and every allegation contained in paragraph 37 of the amended complaint.

38-39. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 38 and 39 of the amended complaint.

40. Deny each and every allegation contained in paragraph 40 of the amended complaint, except (a) admit that a majority of the members of the present Alleghany Board of Directors are named as defendants herein, and (b) deny knowledge or information sufficient to form a belief as to the truth of the allegation that a demand upon the Board of Directors of Alleghany would be futile.

41. Deny each and every allegation contained in para-

graph 41 of the amended complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that a demand upon the shareholders of Alleghany would be futile.

COUNT THREE

42. Responding to paragraph 42 of the amended complaint, repeat and reallege each and every admission, denial and allegation contained in paragraphs 1 through 41 of this answer.

43. Deny each and every allegation contained in paragraph 43 of the amended complaint, except admit that the language quoted appears in the proxy statement dated April 1, 1969, and respectfully refer the Court thereto for the true contents thereof.

44. Responding to paragraph 44 of the amended complaint, respectfully refer the Court to the ICC Report for the true contents thereof and deny any allegations inconsistent with such contents.

45-46. Deny each and every allegation contained in paragraphs 45 and 46 of the amended complaint, except admit that the shareholders of Alleghany were not informed of the assertions contained in such paragraphs; and allege that such assertions were inaccurate and misleading, and further allege that there was no obligation to convey them to the shareholders.

47-50. Deny each and every allegation contained in paragraphs 47 through 50 of the amended complaint.

51. Deny each and every allegation contained in para-

graph 51 of the amended complaint, except admit that the information allegedly omitted from the proxy statement dated April 1, 1969 was not contained therein; and allege that such information was incomplete and misleading, and further allege that there was no obligation to disclose it.

52-54. Deny each and every allegation contained in paragraphs 52 through 54 of the amended complaint.

COUNT FOUR

55. Responding to paragraph 55 of the amended complaint, repeat and reallege each and every admission, denial and allegation contained in paragraphs 1 through 54 of this answer.

56. Deny each and every allegation contained in paragraph 56 of the amended complaint, except admit that each of the companies named owned as of August 1, 1968 the number of shares of Penn Central Company common stock indicated.

57. Deny each and every allegation contained in paragraph 57 of the amended complaint, except admit that the following Alleghany directors served on the indicated Boards of Directors of Penn Central Company or its subsidiaries at the request of Alleghany at some time during the period February, 1968 through March 25, 1970:

Fred M. Kirby

Penn Central Company
Penn Central Transportation Company
Pennsylvania Company

Allan P. Kirby, Jr.

Pittsburgh & Lake Erie Railroad
Company

| | |
|--------------------|--|
| Carlos J. Routh | Penn Central Transportation Company ^{50a} |
| Ralph K. Gottshall | Philadelphia, Baltimore & Washington Railroad Company Baltimore & Eastern Railroad Company |
| Daniel E. Taylor | Penn Central Transportation Company Pennsylvania Company |
| Andrew Van Pelt | Pittsburgh & Lake Erie Railroad Company |

58. Deny each and every allegation contained in paragraph 58 of the amended complaint insofar as such allegations relate to the answering defendants, and deny knowledge or information sufficient to form a belief as to the truth of such allegations insofar as they relate to other directors.

59-61. Deny each and every allegation contained in paragraphs 59 through 61 of the amended complaint, except admit on information and belief that the number of shares of Penn Central Company common stock described therein were sold by the mutual funds on the dates alleged and that the prices alleged are substantially accurate.

62-65. Deny each and every allegation contained in paragraphs 62 through 65 of the amended complaint.

66. Deny each and every allegation contained in paragraph 66 of the amended complaint, except admit that (a) on information and belief, the closing price of Penn Central Company common stock reached a high of \$86 1/2 in 1968 and was \$54 5/8 on March 27, 1969, and (b) the answering defendants were generally aware of the declining market price during this period.

67-68. Deny each and every allegation contained in paragraphs 67 and 68 of the amended complaint.

69. Deny each and every allegation contained in paragraph 69 of the amended complaint, except (a) admit that the defendant directors were generally aware of several adverse developments that occurred during 1969 in the financial conditions of eastern railroads, including Penn Central's railroad operations, and (b) deny any implication that such developments made Penn Central Company stock an improper investment for Alleghany.

70. Deny each and every allegation contained in paragraph 70 of the amended complaint.

71. Deny each and every allegation contained in paragraph 71 of the amended complaint, except admit that Fred M. Kirby and Allan P. Kirby, Jr., as guardians of the property of Allan P. Kirby, Sr., exercised authority with respect to his interests in Penn Central Company stock and that as of March 31, 1968 such shares constituted 390,130 shares of the Penn Central Company common stock or 1.62 percent of such shares outstanding.

72. Deny each and every allegation contained in paragraph 72 of the amended complaint, except admit that the sale of Alleghany's Penn Central Company common stock in 1969 could have had a temporary adverse effect on the market price of Penn Central Company common stock.

73. Deny each and every allegation contained in para-

graph 73 of the amended complaint.

74. Deny each and every allegation contained in paragraph 74 of the amended complaint, except admit on information and belief that Alleghany sold 96,000 shares of Penn Central Company common stock on May 27, 1970 at an average price of \$13.17 per share.

75. Deny each and every allegation contained in paragraph 75 of the amended complaint.

76. Deny each and every allegation contained in paragraph 76 of the amended complaint, except admit on information and belief that in January 1971 Alleghany sold 100,195 shares of Penn Central Company common stock at an average price of \$5.86 per share.

77-81. Deny each and every allegation contained in paragraphs 77 through 81 of the amended complaint.

82. Deny each and every allegation contained in paragraph 82 of the amended complaint, except admit that the sale of Penn Central Company shares was reported in the 1970 and 1971 annual reports of Alleghany; and allege that the sale of such shares was also reported in Alleghany's semi-annual report to shareholders dated June 30, 1970.

COUNT FIVE

83. Responding to paragraph 83 of the amended complaint, repeat and reallege each and every admission, denial,

and allegation contained in paragraphs 1 through 82 of this answer.

84. Admit the allegations contained in paragraph 84 of the amended complaint.

85. Deny each and every allegation contained in paragraph 85 of the amended complaint, and respectfully refer the Court to the proxy statement dated April 1, 1969 for the true contents thereof.

86. Responding to paragraph 86 of the amended complaint, admit that the proxy statement dated April 1, 1969 and the 1968 annual report of Alleghany and the other reports of the Company to the shareholders and the SEC in 1969 did not include the information referred to in paragraph 86 of the complaint, and allege that such information was not required to be contained in such documents.

87-91. Deny each and every allegation contained in paragraphs 87 through 91 of the amended complaint.

COUNT SIX

92. Responding to paragraph 92 of the amended complaint, repeat and reallege each and every admission, denial and allegation contained in paragraphs 1 through 91 of this answer.

93. Admit that plaintiff purports to assert this Count as alleged in paragraph 93 of the amended complaint but

deny that it may be so maintained.

94. Deny each and every allegation contained in paragraph 94 of the amended complaint.

95. Admit the allegations contained in paragraph 95 of the amended complaint, and allege that the language quoted therein now appears in Section 3(c)(7) of the Investment Company Act of 1940.

96-97. Deny each and every allegation contained in paragraphs 96 and 97 of the amended complaint.

COUNT SEVEN

The following response to Count Seven is made only on behalf of defendants John E. Tobin, Fred M. Kirby and Allan P. Kirby, Jr. inasmuch as such Count is not alleged against defendant John J. Burns, Jr.

98. Responding to paragraph 98 of the amended complaint, repeat and reallege each and every admission, denial and allegation contained in paragraphs 1 through 97 of this answer.

99. Deny each and every allegation contained in paragraph 99 of the amended complaint, except (a) admit that Alleghany is incorporated in the State of Maryland, and (b) deny knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is a citizen of the State of New York.

100-101. Admit the allegations contained in paragraphs 100 and 101 of the amended complaint.

102. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 102 of the amended complaint.

103-110. Deny each and every allegation contained in paragraphs 103 through 110 of the amended complaint.

FIRST AFFIRMATIVE DEFENSE

111. The amended complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

112. The amended complaint is barred, in whole or in part, by the applicable statute of limitations and by the doctrines of laches and estoppel.

THIRD AFFIRMATIVE DEFENSE

113. This action may not be maintained as a class action.

FOURTH AFFIRMATIVE DEFENSE

114. This action may not be maintained as a derivative action.

FIFTH AFFIRMATIVE DEFENSE

115. This Court lacks subject matter jurisdiction over the claims asserted in the amended complaint.

SIXTH AFFIRMATIVE DEFENSE

116. The amended complaint is barred, in whole or in part, by the doctrines of primary jurisdiction and exhaustion of administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

117. Answering defendants have at all times acted in good faith and discharged their duties as Directors of Alleghany free of any conflict of interest, and have not engaged in any act, practice or course of conduct in violation of any duty imposed upon them by any law.

WHEREFORE, defendants John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr. and John J. Burns, Jr. respectfully request judgment dismissing the amended complaint, together with the costs, including attorneys' fees, and disbursements of this action, and such further relief as the Court may deem just and

proper.

DEBEVOISE, PLIMPTON, LYONS & GATES

By _____
A Member of the Firm
Attorneys for Defendants
John E. Tobin, Fred M. Kirby,
Allan P. Kirby, Jr. and
John J. Burns, Jr.
Office and P.O. Address:
299 Park Avenue
New York, New York 10017
752-6400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

58a

----- x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- :

JOHN E. TOBIN, FRED M. KIRBY, ALIAN :

P. KIRBY, JR., each in their own :

capacity as directors of Alleghany :

Corporation, and as attorney for and :

guardians of the property of Allan :

P. Kirby, Sr.; JOHN J. BURNS, JR., RALPH :

K. GOTTSHALL, RICHARD R. HOUGH, :

WILLIAM G. RABE, CLIFFORD H. RAMSDELL, :

and CARLOS J. ROUTH, as directors of :

ALLEGHANY CORPORATION, and ALLEGHANY :

CORPORATION, :

Defendants. :

----- x

ANSWER

74 Civ. 5740

(RJW)

Defendant ALLEGHANY CORPORATION ("Alleghany"),

by its undersigned attorneys, Messrs. Cahill Gordon & Reindel,

for its answer to the amended complaint herein ("the complaint"),

alleges as follows:

COUNT ONE

1. Denies each and every allegation of paragraph 1 of the complaint except denies knowledge or information sufficient to form a belief as to whether the amount in controversy, exclusive of interest and costs, exceeds \$10,000.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the complaint, except admits that plaintiff purports to bring this action as alleged in the second sentence of paragraph 2, but denies that such action may be so maintained by plaintiff.

3. Denies each and every allegation of paragraph 3 of the complaint, except admits that Alleghany, at the time of the alleged acts complained of in the amended complaint, was subject to regulation under the Interstate Commerce Act ("ICA"), admits that Alleghany on April 10, 1968 filed a notification of registration under the Investment Company Act of 1940 ("1940 Act") with the Securities and Exchange Commission ("SEC"), avers that such notification of registration included a disclaimer that it was required to do so, and further avers that pursuant to order of the SEC of August 21, 1970 Alleghany ceased to be so registered.

4. Answering paragraph 4 of the complaint, admits that, as of February 28, 1969, Allan P. Kirby, Sr. was the beneficial owner of 4,084,813 shares or 56.12% of the outstanding common stock of Alleghany, refers to the proxy statements and annual reports of Alleghany for a description of the stock held by Allan P. Kirby, Sr. at other times alleged, and denies that Allan P. Kirby, Sr. "controlled" Alleghany or any of its subsidiaries at any such time, as he was judicially declared to be incompetent on June 30, 1967 and defendants Fred M. Kirby and Allan P. Kirby, Jr. were appointed as guardians of his property.

5. Admits the allegations of paragraph 5 of the complaint.

6. Admits that the mutual funds referred to in paragraph 6 of the complaint were registered as alleged, but with respect to any such registration by Alleghany, Alleghany refers to paragraph 3 hereof.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the complaint, except admits that Allan P. Kirby, Sr. was, on June 30, 1967, judicially declared to be incompetent and that Fred M. Kirby and Allan P. Kirby, Jr. were appointed guardians of the property of Allan P. Kirby, Sr. and, as such, they thereafter, until termination of the guardianship, exercised authority with respect to his interests in Alleghany.

8. Answering paragraph 8 of the complaint, admits that Fred M. Kirby and Allan P. Kirby, Jr. have held the following positions since the dates set forth:

| | | |
|---------------------|--|--------------------|
| Fred M. Kirby | Chairman of the Board of Directors of Alleghany | September 14, 1967 |
| | President and Chief Executive Officer of Alleghany | March 19, 1968 |
| | Chairman of the Board of Directors of IDS | January 8, 1965 |
| Allan P. Kirby, Jr. | Director of Alleghany | December 4, 1963 |
| | Chairman of the Executive Committee of the Board of Directors of IDS | January 17, 1968 |

and otherwise denies knowledge or information sufficient to form a belief as the truth of the matters alleged in said paragraph 8.

9. Answering paragraph 9 of the complaint, admits that the following persons have served on the Board of Directors of Alleghany at the times indicated:

| | |
|----------------------|--|
| Fred M. Kirby | January 29, 1958 to May 23, 1961 December 4, 1963 to date |
| Allan P. Kirby, Jr. | December 4, 1963 to date |
| John J. Burns, Jr. | April 26, 1968 to date |
| Ralph K. Gottshall | May 12, 1966 to date |
| William G. Rabe | May 13, 1958 to May 23, 1961 December 4, 1963 to date |
| Clifford H. Ramsdell | May 12, 1966 to December 31, 1972 |
| Carlos J. Routh | January 9, 1968 to date |
| John E. Tobin | April 26, 1968 to date |
| Richard R. Hough | April 23, 1971 to date; |

and further admits that Alleghany had the following number of persons on its Board of Directors at the times indicated:

| | | |
|--------|---|----------------------------------|
| eleven | - | June 4, 1969-February 25, 1970 |
| ten | - | February 25, 1970-March 23, 1970 |
| nine | - | March 23, 1970-April 23, 1971 |
| ten | - | April 23, 1971-July 13, 1971. |

and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 9.

10. Admits the allegations of paragraph 10 of the complaint.

11. Denies the allegations of paragraph 11 of the complaint except admits that, as a result of the merger of the Pennsylvania Railroad Company with the New York Central Railroad Company, Alleghany ceased to control the New York Central Railroad Company.

12. Denies the allegations of paragraph 12 of the complaint, except, with respect to the registration alleged, Alleghany refers to and incorporates its answer to paragraph 3 hereof.

13. Answering paragraph 13 of the complaint, Alleghany refers to the statutes specified for the provisions thereof and denies any allegations contained in paragraph 13 which are inconsistent therewith.

14. Answering paragraph 14 of the complaint, denies the allegation that defendant John E. Tobin was "chief counsel" for Alleghany and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 14, except admits and avers that defendant Tobin was a member of the law firm of Donovan Leisure Newton & Irvine which, from time to time during the period of occurrence of the acts alleged in the complaint, performed legal services for Alleghany.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the complaint.

16. Denies the allegations of paragraph 16 of the complaint and refers to the Interstate Commerce Commission ("ICC") report referred to for the text thereof and denies any allegations inconsistent therewith.

17. Admits the allegations of paragraph 17 of the complaint, refers to ICC report for the text thereof, and denies any allegations inconsistent therewith.

18. Denies the allegations of paragraph 18 of the complaint, except admits that a proxy statement dated April 1, 1969 was sent by Alleghany to its shareholders and refers to that statement for its contents.

19. Denies the allegations of paragraph 19 of the complaint.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the complaint, except admits that the proxy statement, dated April 1, 1969, contained no statement setting forth the information described, and denies any implication that said proxy statement or other statement should have contained such information, and denies that defendant Tobin was "chief counsel" of Alleghany.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of the complaint, except admits that the proxy statement, dated April 1, 1969, contained no statement setting forth the information described, denies any implication that said proxy statement or other statement should have contained such information, avers that such information, if included in the proxy or other statement, would have been incomplete and misleading, and further avers that said proxy statement did contain language noting that Alleghany, in view of certain events, probably would not be subject to Federal income taxes at personal holding company rates.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22 of the complaint.

23-24. Denies the allegations of paragraphs 23 and 24 of the complaint.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25 of the complaint, except admits that the proxy statement for the April, 1970 annual meeting or other statement contained no reference to the "Jones Motor Company transactions" being in violation of any law, and avers that there existed no obligation to so disclose and further avers that the ICC in its Report of January 27, 1970 approved the acquisition of Jones by Alleghany.

26. Answering paragraph 26 of the complaint, denies any implication that approval by the Alleghany shareholders of the transactions set forth in the April 1, 1969 proxy statement was procured in violation of the proxy rules or other rules or regulations of the SEC under the Federal statutes referred to or any other statute; admits that Alleghany did not inform the ICC as to the matters set forth, avers that said matters are inaccurate and untrue, denies that there existed any obligation to so inform; avers that said proxy statement was submitted to the ICC; and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 26.

27. Denies the allegations of paragraph 27 of the complaint except admits that on May 22, 1970 Alleghany filed an application pursuant to § 8(f) of the 1940 Act for an Order declaring that Alleghany had ceased to be an investment company within the meaning of said Act.

28. Denies the allegations of paragraph 28 of the 65a complaint, except admits that, on August 21, 1970, the SEC ordered deregistration of Alleghany under the 1940 Act, refers to that Order for the text thereof, and denies any allegation inconsistent therewith.

29. Admits the allegations of paragraph 29 of the complaint.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30 of the complaint and denies any implication that Alleghany or any one acting on its behalf in any way offered any position to Chairman Budge or in any other way sought to influence him for the purpose of securing an improper performance by Chairman Budge of his official duties.

31. Denies the allegations of paragraph 31 of the complaint.

COUNT TWO

32. Alleghany repeats and realleges, as if set forth in full herein, paragraphs 1-31 of its answer to the complaint.

33. Denies the allegations of paragraph 33 of the complaint except admits that in 1970 Alleghany paid, in payment for legal services, \$316,927 to the law firm of Donovan Leisure Newton & Irvine of which defendant Tobin was, at the time, and is a partner.

34. Denies the allegations of paragraph 34 of the complaint and avers that the price paid for Jones' business included \$6,336,208 for intangible operating rights owned by Jones.

35. Answering paragraph 35 of the complaint, admits that Jones Motor Co. operated at a loss of \$2,239,380 before income taxes in 1970, but avers that the purchase of Jones was made in 1968, a year in which Jones operated at a substantial profit, and denies any implication that Jones was improperly purchased in 1970 at a time when it was operating in a loss position.

36. Answering paragraph 36 of the complaint, admits that at no time prior to April 30, 1970 did Alleghany or any of the other defendants seek to renegotiate the Jones Motor Co. transaction, but denies any implication that they should have done so or that Alleghany had the right or ability to do so; refers to the cited ICC Report for the text thereof and denies any characterization of plaintiff inconsistent therewith.

37. Denies the allegations of paragraph 37 of the complaint.

38. Answering paragraph 38 of the complaint, denies any implication that many of the acts alleged in the complaint actually occurred, but admits that of those acts admitted by Alleghany to have occurred some occurred in the Southern District of New York.

39. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 39 of the complaint.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of the complaint, except denies that the directors referred to are nominees of the Kirby family, denies that the "defendant Kirby family" controls Alleghany, and admits that a majority of the members of the present Alleghany Board of Directors are named as defendants herein.

41. Denies that the defendants Kirby, at the time this suit was brought, owned and controlled more than 50% of the common stock of Alleghany and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 41 of the complaint.

COUNT THREE

42. Alleghany repeats and realleges, as if set forth in full herein, paragraphs 1-41 of its answer to the complaint.

43. Admits that the proxy statement of April 1, 1969 contained the language quoted, but otherwise denies the truth of the allegations of paragraph 43 of the complaint.

44. Answering paragraph 44 of the complaint admits that the ICC Report referred to contained the passage quoted, refers to said report for the text thereof, and denies any allegation inconsistent therewith.

45. Admits that the shareholders of Alleghany were not informed of the matters alleged in paragraph 45 of the complaint and avers, with respect to those matters, that

the reason the shareholders were not so informed is that the matters asserted were inaccurate, misleading or untrue and that there existed no obligation to so inform the stockholders of such matters.

46. Answering paragraph 46 of the complaint, denies that Alleghany expended funds to solve any individuals' tax problems and denies knowledge or information sufficient to form a belief as to truth of the remaining allegations of paragraph 46, except admits that the shareholders of Alleghany were not informed of the matters set forth and avers that the reason they were not so informed is that the matters asserted were inaccurate, misleading or untrue and that there existed no obligation to so inform the stockholders of such matters.

47-50. Denies the allegations of paragraphs 47 through 50 of the complaint.

51. Denies the allegations of paragraph 51 of the complaint, except admits that said proxy statement did not contain the information described and avers that there existed no obligation to disclose such information, which, if disclosed, would have been incomplete and misleading.

52-54. Denies the allegations of paragraphs 52 through 54 of the complaint.

COUNT FOUR

55. Alleghany repeats and realleges, as if set forth in full hereir, paragraphs 1-54 of its answer to the complaint.

56. Answering paragraph 56 of the complaint, admits that the corporations listed owned, on or about August 1, 1968, the shares listed, that IDS was the investment advisor for the three mutual funds shown, and that Alleghany was the controlling stockholder of IDS, refers, with respect to Alleghany's characterization as a registered investment company, to and incorporates herein its answers to paragraphs 3 and 12 of this Answer, and denies knowledge or information sufficient to form a belief as to any other allegations intended to be included in said paragraph 56.

57. Admits that at some time during the period from February, 1968 through March 25, 1970 the persons specified sat on the Boards of Directors of Penn Central Company or of its subsidiaries at the request of Alleghany, but otherwise denies the allegations of paragraph 57 of the complaint.

58. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 58 of the complaint.

59-61. Denies knowledge or information sufficient to form a belief as to the truth of the allegations as in paragraphs 59 through 61 of the complaint, except admits the substantial accuracy of the fact of the stock sales referred to and of the amounts involved in such sales, but reserves the right to demand proof of or to show the specific facts of such sales and amounts if the facts thereof become material, and denies that investment in Penn Central no longer was a suitable investment for a registered investment company.

62. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62 of the complaint, except denies any implication that Alleghany failed to act diligently, timely and prudently with regard to the sale of stock in the Penn Central Company and, with respect to any implication that Alleghany was a registered investment company, refers to its answers contained in paragraphs 3 and 12 of this Answer.

63. Answering paragraph 63 of the complaint, denies the allegations made with respect to Alleghany, denies that investment in Penn Central was no longer a proper investment for a registered investment company, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 63.

64. Denies any implication that Alleghany's stock holding in the Penn Central Company was the sole basis for the six Penn Central board seats referred to and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 64 of the complaint.

65. Answering paragraph 65 of the complaint, denies that defendant Tobin was Alleghany's "chief counsel", denies that Alleghany's ownership of Penn Central shares and the resulting interlocking Boards of Directors would have been a basis for continuing the ICC jurisdiction over Alleghany, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 65.

66-69. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 66 through 69 of the complaint.

70. Denies any implication that the capital stock of the Penn Central Company was not a suitable investment for a registered investment company under the 1940 Act, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 70 of the complaint.

71. Admits that at the time of some of the alleged acts complained of in the complaint, defendants Fred M. Kirby and Allan P. Kirby, Jr., as guardians of the property of Allan P. Kirby, Sr., and Alleghany held the amounts and percentages of shares referred to and that, taken together, those interests were the second largest shareholders of Penn Central, denies any implication that those interests were the sole basis for the board seats referred to, avers that in its Report dated January 27, 1970 approving the Jones acquisition, ICC approval was conditioned upon the termination of all interlocking directorates between Alleghany and Penn Central, its subsidiaries and affiliates, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 71 of the complaint.

72. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 72 of the complaint.

73. Denies that the defendants Kirbys "caused" Alleghany to retain its Penn Central shares and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 73 of the complaint.

74. Denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 74 of the complaint except admits that Alleghany sold 96,000 shares of Penn Central stock on May 27, 1970 at an average price of \$13.17 per share.

75. Denies that the sale of stock in Penn Central on May 27, 1970 was made "in competition" with the sale of stock by Investor Mutual, Inc. and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 75 of the complaint.

76. Admits that in January 1971, Alleghany sold its remaining holdings of 100,195 shares of Penn Central stock at an average price of \$5.86 per share, but otherwise denies the allegations of paragraph 76 of the complaint.

77. Denies any implication that defendant Alleghany may have acted less than timely or prudently with respect to the sale of its Penn Central stock, admits that \$1,851,392 was received by Alleghany in the sale of 196,195 shares of Penn Central stock at an average price of approximately \$9.50 per share, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 77 of the complaint.

78-81. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 78 through 81 of the complaint.

82. Denies the allegations of paragraph 82 of the complaint except admits that the sale of Penn Central stock was disclosed in the 1970 and 1971 annual reports and avers that the sale of the Penn Central stock was also disclosed in Alleghany's semi-annual report to shareholders dated June 30, 1970.

COUNT FIVE

83. Alleghany repeats and realleges, as if set forth in full herein paragraphs 1-82 of its Answer to the complaint.

84. Admits the allegations contained in paragraph 84 of the complaint.

85. Denies that the proxy statement referred to or other reports of Alleghany implicitly represented that the directors would discharge their fiduciary duties as claimed, refers to the statement or reports for the contents thereof, denies any allegation inconsistent therewith, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 85 of the complaint.

86. Answering paragraph 86 of the complaint, admits that the April 1969 proxy statement and the annual report of Alleghany for 1969 and the other reports of the company to the shareholders and the SEC in 1969 did not disclose the matters

referred to, but denies any implication that such statements were required to contain such information under the SEC proxy rules or any other regulations or rules administered by the SEC.

87-88. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 87 and 88 of the complaint except, with respect to any implication that Alleghany was a registered investment company, refers to its answers to paragraphs 3 and 12 of this Answer.

89. Admits that Alleghany sustained a loss in the amount of \$1,853,126 in 1970 and 1971 through its sales of its Penn Central stock, such loss being measured by the differences between the costs of and the prices obtained for the shares sold; denies that its investment in Penn Central Company was not a suitable investment for a registered investment company, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 89 of the complaint.

90. Denies, on information and belief, the allegations of paragraph 90 of the complaint and avers that the answer hereto does not modify or change, in any respect, Alleghany's responses answering any of the allegations contained in Count Three of the complaint.

91. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 91 of the complaint.

COUNT SIX

92. Alleghany repeats and realleges, as if set forth in full herein, the allegations of paragraphs 1-91 of its Answer to the complaint.

93. Admits that plaintiff purports to bring this count as alleged in paragraph 93 of the complaint but denies that it may be so maintained.

94. Denies the allegations contained in paragraph 94 of the complaint.

95. Answering the allegations of paragraph 95 of the complaint, admits that plaintiff purports to set forth, "i. pertinent part," Section 3(c)(9) of the 1940 Act, avers that said language now appears in Section ³(c)(7) of the 1940 Act, refers to said Section for the text thereof, and denies any allegation inconsistent therewith. NY

96. Denies any implication that the exemption provided for in Section 3(c)(9) of the 1940 Act was not available to Alleghany at any time such exemption was claimed by Alleghany to be available to it, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 96 of the complaint.

97. Denies the allegations of paragraph 97 of the complaint.

COUNT SEVEN

98. Alleghany repeats and realleges, as if set forth in full herein, the allegations of paragraphs 1-95 of its Answer to the complaint.

99. Admits that Alleghany is incorporated in the State of Maryland, denies knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff is a citizen of the State of New York, and otherwise denies the allegations of paragraph 99 of the complaint.

100-101. Admits the allegations of paragraphs 100 and 101 of the complaint.

102. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 102 of the complaint.

103. Denies the allegations of paragraph 103 of the complaint.

104-110. Denies the allegations made with respect to Alleghany in paragraphs 104 through 110 of the complaint, and denies, on information and belief, the remaining allegations of said paragraphs.

FIRST AFFIRMATIVE DEFENSE

111. The complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

112. The complaint is barred, in whole or in part, by the applicable statutes of limitations or by the doctrines of laches and estoppel.

THIRD AFFIRMATIVE DEFENSE

113. This action may not be maintained by plaintiff as a class action.

FOURTH AFFIRMATIVE DEFENSE

114. This action may not be maintained by plaintiff as a derivative action.

FIFTH AFFIRMATIVE DEFENSE

115. This Court lacks subject matter jurisdiction, in whole or in part, over the claims sought to be asserted in the complaint.

SIXTH AFFIRMATIVE DEFENSE

116. Pursuant to Orders of the Interstate Commerce Commission, Alleghany was subject to regulation by that Agency under the Interstate Commerce Act beginning at a time long prior to the earliest events mentioned in the complaint herein, and it has continued subject to such regulation.

117. Alleghany informed its shareholders in its 1968 Annual Report that it had acquired virtually all of the outstanding stock of Jones Motor Co., Inc. and had applied to the Interstate Commerce Commission for the appropriate authorizations implementing the transactions. Notice of initiation of this proceeding was published in the Federal Register and was served upon plaintiff Phillips. These notices afforded interested persons an opportunity to present their views to the ICC.

118. The ICC, by Order dated January 27, 1970, approved the acquisition as in the public interest. The Order provided, in accordance with its terms and the terms of the Interstate Commerce Act, for Alleghany's continued regulation by the Interstate Commerce Commission. The time to petition for review of said Order has expired, and a petition to review it, even if timely, would be beyond the jurisdiction of this Court.

119. Alleghany also informed its shareholders in its 1969 Annual Report that Alleghany would be applying to the Securities and Exchange Commission for an Order declaring that it had ceased to be an investment company under the 1940 Act.

120. The SEC, on July 16, 1970, issued a public notice in the Federal Register of Alleghany's application for such an Order. The notice gave interested persons an opportunity to request a hearing with respect to said application.

121. The SEC, by Order dated August 21, 1970, granted Alleghany's application, and Alleghany's shareholders were so informed in its 1970 Semi-Annual Report. The time to petition for review of the SEC Order has expired, and a petition to review it, even if timely, would be beyond the jurisdiction of this Court.

122. These Orders determine that Alleghany is subject to regulation by the ICC pursuant to the Interstate Commerce Act, rather than to regulation by the SEC pursuant to the Investment Company Act of 1940, and they are not subject to collateral attack by plaintiff in this action. Plaintiff's challenge to such Orders is beyond the jurisdiction of this Court.

SEVENTH PARTIAL AFFIRMATIVE DEFENSE

123. Alleghany is incorporated under the laws of Maryland and may, under that law, exercise discretion in declaring and distributing as dividends its net income or any part thereof.

124. Alleghany is entitled under the laws of Maryland and, by virtue of the approvals heretofore granted by the Interstate Commerce Commission, is entitled under the laws of the United States to own the stock and assets of, and to exercise control over, its Jones Motor Division. Alleghany is entitled to exercise discretion with respect to the retention or alienation of such properties and of their control.

125. Assuming the applicability of the relevant statutory standards, Alleghany is lawfully vested with discretion to determine whether its activities shall be regulated by the Interstate Commerce Commission pursuant to the Interstate Commerce Act or by the Securities and Exchange Commission pursuant to the Investment Company Act of 1940.

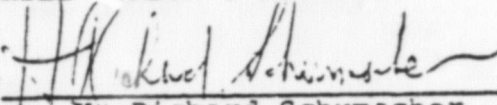
126. Items 1, 4, 5 and 6 of plaintiff's prayer for relief represent unlawful attempts to usurp managerial prerogatives which lawfully belong to the directors and officers of defendant Alleghany as the representatives of all of its stockholders.

WHEREFORE, defendant Alleghany prays that the Court enter an order dismissing the complaint, together with costs

and attorneys' fees in accordance with law and such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 17, 1975

CAHILL GORDON & REINDEL

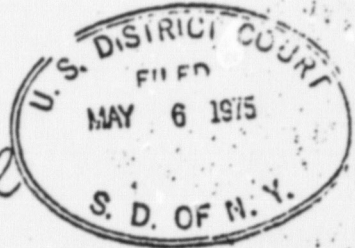
By 
By Richard Schumacher
Attorneys for Defendant
Alleghany Corporation
Office and P. O. Address
80 Pine Street
New York, New York 10005
(212) 944-7400

TO: Clerk of the Court
U.S. District Court for the
Southern District of New York

Mr. Randolph Phillips
Plaintiff Pro Se
30 East 72 Street
New York, New York 10021

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorney for and guardians of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR., RALPH K. GOTTSHALL, RICHARD R. HOUGH, WILLIAM G. RABE, CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of ALLEGHANY CORPORATION, and ALLEGHANY CORPORATION,

Defendants.
-----x

NOTICE OF MOTION

74 Civ. 5740 (RJW)

S I R S:

PLEASE TAKE NOTICE that, upon the affidavit of Jared C. Horton, sworn to on May 5, 1975, the affidavit of Theodore E. Somerville, sworn to on May 5, 1975, the affidavit of Joseph A. Clark, III, sworn to on May 5, 1975, upon the accompanying papers and memoranda of law, and upon all the papers, pleadings and proceedings had herein to date, the undersigned, as attorneys for the defendants John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr., and John J. Burns, Jr., will move this Court, before the Honorable Robert J. Ward, United States District Judge, in Room 2704, United States Courthouse, Foley Square, New York, New York, on June 3, 1975, at ^{2:15} 2:00 p.m., or as soon thereafter as counsel can be heard, for judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, dismissing,

7th Cir. 5740 (200)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANTOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, et al.,

Defendants.

NOTICE OF MOTION

DEBEVOISE, PLIMPTON, LYONS & GATES

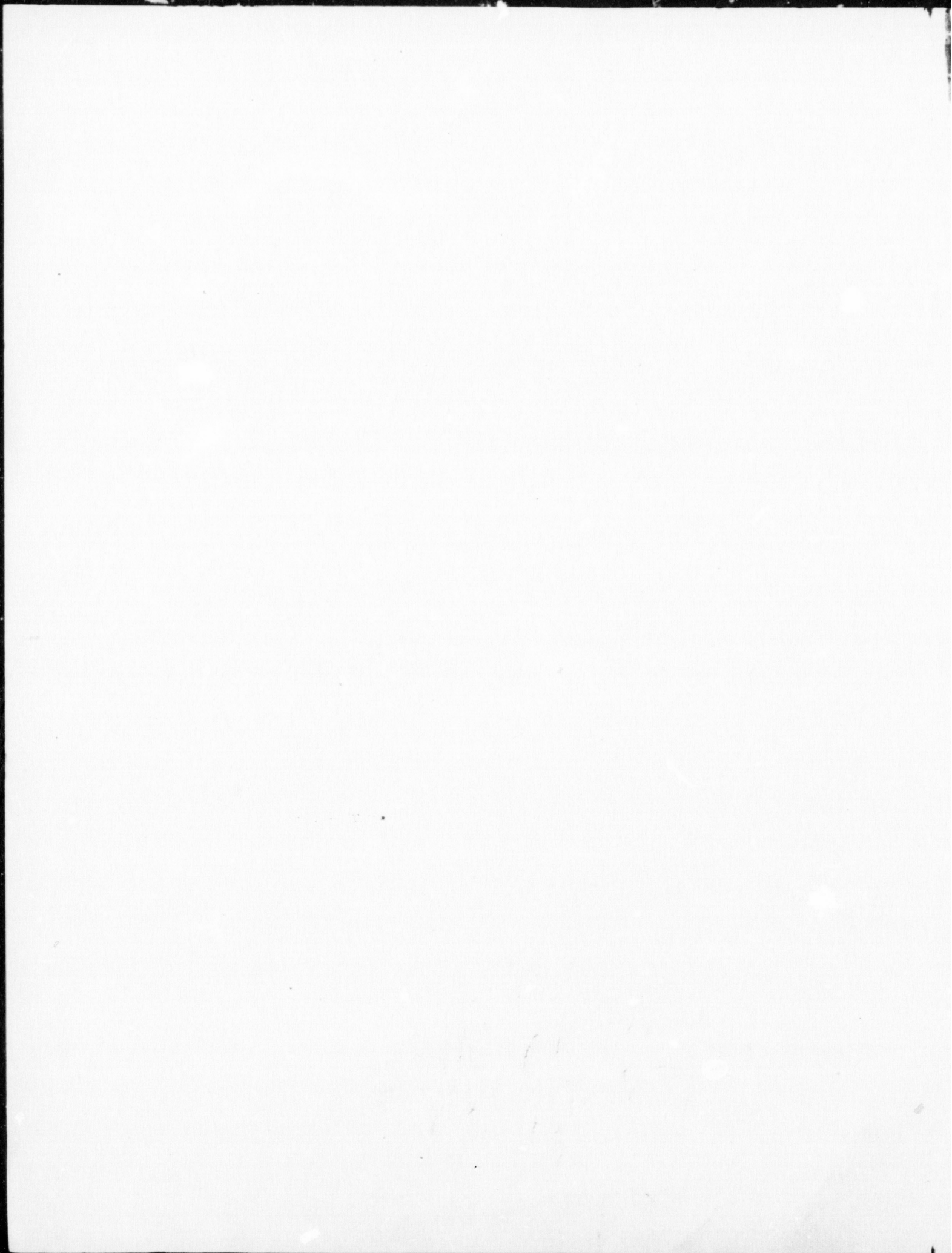
ATTORNEYS FOR Defendants John E. Tobin, Fred
M. Kirby, Allen P. Kirby, Jr.
and John J. Burns, Jr.270 PARK AVENUE,
BOROUGH OF MANHATTAN,
CITY OF NEW YORK,
NEW YORK

7514600

Motion granted in part and denied
in part in accordance with memorandum
decision filed herewith.*Robert J. Wind*
U. S. D. S.

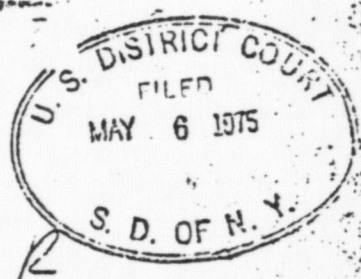
Dated: NOVEMBER 5, 1975

*Copy 5-5-75
1-15-75*



MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own
capacity as directors of Alleghany
Corporation, and as attorney for
and guardian of the property of
Allan P. Kirby, Sr., JOHN J. BURNS,
JR., RALPH K. GOTTSHALL, RICHARD R.
HOUGH, WILLIAM G. RABE, CLIFFORD M.
RAMSDELL, and CARLOS J. ROUTH, as
directors of ALLEGHANY CORPORATION,
and ALLEGHANY CORPORATION,

Defendants.
-----x

74 Civil 5740
(RJW)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, upon the affidavits of
Theodore E. Somerville, Jared C. Horton and Joseph A. Clark II
verified on May 5, 1975, and the exhibits annexed thereto, and
the pleadings, and all the prior proceedings had herein, de-
fendant Alleghany Corporation ("Alleghany") will move this
Court in Room 2704, United States Courthouse, Foley Square,
New York, New York, before the Hon. Robert J. Ward on the 3rd
day of June 1975 at 2:15 P.M. or as soon thereafter as counsel
can be heard, for a judgment, pursuant to Rule 12(c) of the
Federal Rules of Civil Procedure, dismissing plaintiff's amended

Civil Action No.
74-5740 (RJW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, et al.,

Defendants.

NOTICE OF MOTION

CAHILL GORDON & REINDEL
Attorneys for Defendant
Alleghany Corporation
Office & P. O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

Motion granted in part and denied
in part in accordance with memorandum
decision filed herewith.

Robert J. Wood
U. S. D. J.

Dated: NOVEMBER 5, 1975

*Copy 1-75
1-75
1-75*



Procedure that the plaintiff in a derivative action "fairly and adequately represent the interests of the shareholders . . . similarly situated in enforcing the right of the corporation"

3. I have reviewed materials obtained from litigation files of Alleghany as well as Court records and published materials relating to the many previous litigations involving Mr. Phillips, Alleghany and its officers, directors and affiliates and .s. This affidavit and Exhibit A hereto outline facts ascertained in the course of this review.*

4. The purpose of this affidavit is to present a detailed account of another litigation now pending before Judge Tenney, Phillips v. Investors Diversified Services, Inc. and Alleghany Corp., S.D.N.Y. 72 Civ. 1544 (CHT) (hereinafter the "fee litigation"). In that case Mr. Phillips, appearing pro se, sued Alleghany and Investors Diversified Services, Inc. ("IDS"), a company in which Alleghany owns a substantial stock interest, seeking a judgment of \$94,950 for "legal fees" allegedly owed Mr. Phillips for his own services. Mr. Phillips' complaint was dismissed as to Alleghany for want of subject matter jurisdiction in September 1972,** but he is pursuing the action vigorously

* The exhibits to this affidavit are submitted under separate cover.

** This action, Phillips v. Tobin, et al., which relates to events five or seven years ago, was initiated on December 30, 1974, ten days after the remaining defendant in the fee litigation had filed a motion to dismiss and/or for summary judgment.

against IDS.* Submitted with this affidavit s Exhibit A is an appendix which describes, in relevant detail, more than a dozen other litigations in which Mr. Phillips has been involved over approximately the last three decades.**

5. The fee litigation arises out of Mr. Phillips' pro se defense of himself as a named party, during the early 1960's,

* The "fee litigation" and the present derivative action are two of at least four actions which Mr. Phillips currently is prosecuting pro se. The others are a suit for damages pending before Judge Lasker against the American Stock Exchange, Phillips v. American Stock Exchange, [Current Binder] CCH Fed.Sec.L.Rep. ¶ 95,035 (S.D.N.Y. 1975), and an action in the federal courts of the District of Columbia which seeks a declaratory judgment that President Ford is not legally serving in his office, and that he must refund his salary payments to the Treasury, Phillips v. Nixon, D.C.D.C. 74 Civ. 736. The Nixon complaint was dismissed by the District Court, and Mr. Phillips has briefed an appeal which now awaits argument in the Court of Appeals for the District of Columbia Circuit.

On February 17 of this year, Judge Stewart dismissed a complaint by Mr. Phillips and an organization styled "Committee for Fair Play to Voters" which sought a declaratory judgment that former Attorney General William B. Saxbe did not legally serve in that office. See Committee for Fair Play to Voters v. Saxbe, S.D.N.Y. 74 Civ. 942 (CES). In addition Mr. Phillips' wife, Mrs. Lily Phillips, is the plaintiff in a derivative action allegedly on behalf of one of the mutual funds managed by IDS. See Phillips v. Bradford, S.D.N.Y. 73 Civ. 2118 (HFW).

** Part I of Exhibit A deals with a number of cases involving Alleghany and those associated with it. Part II describes other cases involving Mr. Phillips and entities and persons unrelated to Alleghany.

in an action entitled Alleghany Corp. v. Kirby, 218 F.Supp. 164^{88a} (S.D.N.Y.), aff'd, 333 F.2d 327 (2d Cir. 1964). Alleghany Corp. v. Kirby is described in Exhibit A at pp. 1-7.) Mr. Phillips' role in the latter case stemmed from his position, in the early 1960's, as a director of IDS.

6. Since the completion of Alleghany Corp. v. Kirby, Mr. Phillips on several occasions, has sought recovery from Alleghany or IDS of \$94,950 in "legal fees", which is alleged by Mr. Phillips to be the value of the services he expended in defending himself pro se in that action. (Exhibit A hereto at p. 4.)

7. According to an affidavit which Mr. Phillips filed in the fee litigation on February 4, 1975 (Exhibit B hereto), Mr. Phillips' final non-judicial request for payment of the \$94,950 was rejected on November 30, 1970 by John Tobin, Esq. Mr. Tobin is a member of the law firm of Donovan Leisure Newton & Irvine, a director of Alleghany, and one of the individual defendants in the instant action. In an affidavit, verified on June 12, 1972 and filed in connection with an early motion in the fee litigation, Mr. Phillips contended that Mr. Tobin's personal animosity to Mr. Phillips accounted for the rejections by Alleghany and IDS of his fee demand. (Exhibit C hereto is the relevant portion of said affidavit.)

8. Mr. Phillips filed his complaint against Alleghany and IDS in the fee litigation on April 14, 1972. Shortly thereafter he procured, in circumstances hereafter described, the

entry by the Clerk of a default judgment against Alleghany. 89a
The following account of circumstances giving rise to the default is based on Judge Frankel's memorandum opinion of June 15, 1972, which vacated the default. (Judge Frankel's Opinion is Exhibit D hereto.)

9. On May 9, 1972 Alleghany retained counsel to defend it in the fee litigation. Alleghany's time to move or answer the complaint was about to expire. After Alleghany's counsel had attempted unsuccessfully to reach Mr. Phillips to request a stipulation for an extension of time, they applied to Judge Lasker on May 10, 1972 for an ex parte order extending Alleghany's time to move or answer. Judge Lasker signed the order which provided, inter alia, that service of it upon Mr. Phillips on or before May 15, 1972 would be deemed sufficient service. Alleghany's counsel mailed a copy of the order to Mr. Phillips on May 11, 1972, but the order was not "instantly" filed with the Clerk.

10. Mr. Phillips caused a default judgment to be entered against Alleghany on May 12, 1972. After attempts to vacate the default by agreement between the parties failed, Alleghany brought on, by order to show cause, a motion to vacate the default. Judge Frankel granted the requested vacatur on June 15, 1972, stating in his memorandum:

"The ensuing proceedings, for what should have been routine correction of a situation that should never have existed in the first place, have been prolonged and exasperating beyond any due measure. And the main causes of the

unpleasantness have been the tenacious bellicosity and abusiveness of the plaintiff.

90a

* * *

". . . plaintiff has not stinted in heaping insult upon opposing counsel; he has filed voluminous and gratuitous attacks upon various state and federal judges; he has festooned his papers with baseless and essentially irrelevant charges of fraud, including 'fraud upon this court,' malice, 'hidden motives,' and, to end with one of his gentler notes, the 'obvious ignorance' of counsel for defendant. He has urged, preposterously, that counsel for defendant be 'fined' and 'censured.'" (Exhibit D at pp. 3-4.)

11. On June 16, 1972 Mr. Phillips filed a notice of motion for reargument. The basis for this request was an assertion that Judge Frankel's former law firm had opposed Mr. Phillips in earlier cases allegedly relating to the fee litigation. Mr. Phillips' moving memorandum (Exhibit E hereto) charged Judge Frankel with violations of the Canons of Judicial Ethics. Judge Frankel denied the motion and, in a memorandum opinion dated July 3, 1972 (Exhibit F hereto), said:

"Having joined the roster of judges and others charged with fraud by this plaintiff, I have duly considered the assertion that I should heretofore have recused myself from this case or should do so now.

* * *

"Defendant's papers sufficiently refute, I think, the atrocious conclusions plaintiff would draw from my involvement 15 years or so ago as an associate in the law firm of which I later became a member.

"If facts like these could be disqualifying - or could be deemed by a rational person to create appearances of impropriety - the judges of this court would spend much of their time reviewing their work lives and handing over to each other such routine chores as the motion in the instant case."

12. In papers submitted at various stages of the fee litigation Mr. Phillips has made charges of serious misconduct against several judges and members of the bar.* In some instances his charges have referred to misconduct which ostensibly occurred within the fee litigation itself, while in other instances he has alleged conduct which supposedly occurred in earlier cases in which Mr. Phillips had been involved in one or more capacities.

13. In addition to Judge Frankel, the list of individuals thus charged includes: (a) John Tobin, Esq., a director of Alleghany and a defendant in this action; (b) Former Chief Judge Henry J. Friendly of the Court of Appeals for the Second Circuit; (c) Judge William H. Timbers of the same court;** (d) The Hon. Owen McGivern, former Presiding Justice of the Appellate Division, First Department of the New York State Supreme Court; (e) Robert Fitzsimmons, Esq., a Special Master of this Court and a Referee of the New York State Supreme Court in cases in which Mr. Phillips had been involved; and (f) Richard Bond, Esq., IDS' chief counsel in the fee litigation.

* Exhibit A describes other instances in which Mr. Phillips leveled unsubstantiated charges of corrupt conduct against adversaries and against judicial officers who presumed to decide matters against him. The complaint in this action includes, in passing, a suggestion (Cplt. ¶¶ 29, 30) that the actions of the Securities and Exchange Commission which Mr. Phillips' complaint attacks were influenced by an alleged attempt to influence the then Chairman of the Commission.

** Judge Timbers was attacked for "bias" after he had declined to reverse Judge Frankel's decision vacating the above-described default. In an application for reconsideration of Judge Timbers' decision, dated August 11, 1972 (Exhibit G hereto),

14. As noted above, Alleghany was dismissed from the fee litigation on September 25, 1972 for lack of subject matter jurisdiction. Mr. Phillips filed an appeal which the Court of Appeals dismissed on May 21, 1974 for failure to prosecute.

15. The action continued against IDS. On December 20, 1974 IDS filed a motion to dismiss and/or for summary judgment. As of this date, the motion is sub judice before Judge Tenney. As noted above, on December 30, 1974, ten days after IDS submitted its motion to dismiss in the fee litigation, Mr. Phillips filed his complaint in this case.

16. On January 31, 1975, Mr. Phillips filed a notice in the fee litigation to depose IDS by its Chairman, Fred M. Kirby, a defendant in this action. In response, IDS sought and Judge Tenney granted on February 4 an order to show cause, returnable February 7, to vacate the notice of deposition of Mr. Kirby and to stay all pre-trial discovery until after a determination of the pending motions for dismissal or for summary judgment. The motion also asked for an order prohibiting Mr. Phillips from communicating with IDS or with Alleghany or with their officers,

(Footnote continued from preceding page)

Mr. Phillips cited the following grounds for Judge Timbers' alleged "bias": (i) Phillips was then the chairman of "The National Committee for the Impeachment of Richard M. Nixon"; (ii) Judge Timbers had been appointed to the Court of Appeals by Mr. Nixon; (iii) Judge Timbers is a Republican who served as General Counsel of the SEC during the Eisenhower Administration; (iv) Judge Timbers' previous law practice had included as clients many large corporations and corporate interests which favored the re-election of Mr. Nixon; and (v) Judge Timbers had been a delegate to the 1956 Republican National Convention which had nominated Mr. Nixon for re-election to the Vice Presidency.

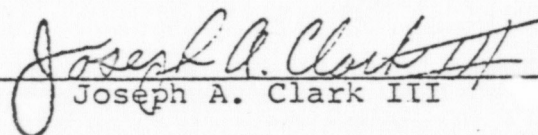
directors, employees, or agents, concerning the fee litigation except through counsel for IDS and Alleghany.* On the return date Mr. Phillips did not contest this motion, and Judge Tenney orally granted the relief sought and on February 18, 1975 signed a written order to that effect (Exhibit H hereto).

17. In the interim, on February 10, Mr. Phillips sought, by order to show cause, to have the oral order vacated. He also asked the Court to cite Mr. Bond for contempt of court for, inter alia, allegedly filing a false affidavit of service of IDS' February 4 order to show cause. The relief sought was denied.

18. On February 19, the day after Judge Tenney had signed his order staying the proposed deposition of Mr. Kirby in the fee litigation, the defendants in the present litigation received in the mail a notice to depose Alleghany through the said Mr. Kirby and four other officers or directors of Alleghany. On February 25, this Court signed an order to show cause staying that discovery pending the Court's determination of the defendants' motion, subsequently granted, for a protective order vacating the notice of deposition. On February 27, 1975 Mr. Phillips filed notice of appeal from Judge Tenney's order of February 18.

* The supporting affidavit of IDS' counsel informed Judge Tenney that Mr. Phillips had attempted to communicate directly with at least one IDS officer.

19. Meanwhile, Mr. Phillips also filed motions in the fee litigation to disqualify IDS' counsel, Mr. Bond, and to stay all proceedings pending determination of the disqualification motion. The disqualification motion, filed February 4, 1975, charges that Mr. Bond was formerly an associate of Donovan Leisure Newton & Irvine, a firm which had represented some of Mr. Phillips' co-defendants in Alleghany v. Kirby and allegedly, according to Mr. Phillips, had represented him in connection with transactions related to that same action which ostensibly gives rise to Mr. Phillips' right to the "fees" he is suing for in the fee litigation. (See Exhibit B hereto.)


Joseph A. Clark III

Sworn to before me this

5th day of May, 1975


Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- :

74 Civ. 5740
(RJW)

JOHN E. TOBIN, FRED M. KIRBY, ALLAN :
P. KIRBY, JR., each in their own :
capacity as directors of Alleghany :
Corporation, and as attorney for and :
guardians of the property of Allan :
P. Kirby, Sr., JOHN J. BURNS, JR., :
RALPH K. GOTTSHALL, RICHARD R. HOUGH, :
WILLIAM G. RABE, CLIFFORD H. RAMSDELL, :
and CARLOS J. ROUTH as directors of :
ALLEGHANY CORPORATION, and ALLEGHANY :
CORPORATION, :

EXHIBITS TO
AFFIDAVIT
OF
JOSEPH A. CLARK, III

Defendants. :

- - - - - x

APPENDIX TO CLARK AFFIDAVIT

Part I of this Appendix (pp. 1-28) describes particular highlights of some of Mr. Phillips' previous litigations with Alleghany and those associated with it. Part II, (pp. 29-41) describes Mr. Phillips' extensive history of litigation against persons unrelated to Alleghany. Even this extensive Appendix does not attempt to identify all of the cases in which Mr. Phillips has been involved. Enough is presented, however, to give this Court an overview of his litigious history.

PART I

1. Background to the Fee Litigation and Related Cases

This Appendix is submitted with the Clark affidavit which describes in considerable detail the case of Phillips v. Investors Diversified Services, Inc., S.D.N.Y. 72 Civ. 1544 (CHT) the "fee litigation" which currently is pending before Judge Tenney. That case emerges out of a lengthy history of legal strife in which Mr. Phillips has been a central figure. The history can be traced back at least to 1954. In that year, and early the following year, several derivative actions were filed on behalf of Alleghany in the New York State Supreme Court and thereafter consolidated sub

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nom. Zenn, et al. v. Anzalone, et al. The law firm of Pomerantz, Levy & Haudek appeared as lead counsel for the plaintiffs in the consolidated action, and their pleadings attacked, inter alia, various transactions in stock of IDS by Alleghany and interests associated with the Murchison family of Texas. These transactions were alleged to have resulted in Alleghany's loss of control of IDS.

In February of 1955 another derivative action on behalf of Alleghany was filed in the Southern District of New York sub nom. Breswick & Co. v. Briggs. The complaint included charges paralleling some of those made in Zenn. The attorney for plaintiffs in Breswick was George Brussel, Jr., Esq. Mr. Phillips participated as a "consultant" to Mr. Brussel.

In April of 1955, the parties to the State court action reached a tentative settlement which Mr. Justice Owen McGivern referred to Referee Robert J. Fitzsimmons for evaluation as to fairness. Samuel R. Rosen, represented by the law firm of Graubard and Moskovitz, objected. Mr. Phillips functioned as a "consultant" to Seymour Graubard, Esq. and to Mr. Rosen.

While the hearings before Referee Fitzsimmons were in progress, the Breswick plaintiffs obtained an order from Judge Walsh enjoining persons who were defendants in Zenn from pleading as res judicata in Breswick any judgment obtained in any other action not negotiated with the Breswick plaintiffs or with their attorneys. Breswick & Co. v. Briggs, 135 F.Supp.

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397 (S.D.N.Y. 1955). The upshot was a proposal by the Breswick defendants to augment the settlement which had been offered in Zenn and which then was before Referee Fitzsimmons for his consideration.

Plaintiffs' counsel in Breswick rejected the "improved" offer. Mr. Fitzsimmons was appointed a Special Master to determine whether new developments justified vacatur of the earlier injunction. On November 17, 1958, Mr. Fitzsimmons submitted his reports in both Zenn and Breswick. He recommended that the injunction be vacated and that Mr. Justice McGivern approve the improved settlement which the defendants had offered.

Mr. Justice McGivern approved the report rendered by Mr. Fitzsimmons, but directed that entry of judgment be stayed while the Breswick injunction remained in effect. (Zenn v. Anzalone, 17 Misc.2d 897, 191 N.Y.S.2d 840 (Sup.Ct. N.Y.Co. 1959))

Judge Dimock rejected Mr. Fitzsimmons' report and declined to vacate the injunction. Thereafter, further negotiations took place in which Mr. Phillips apparently played a prominent role on behalf of the plaintiffs. These discussions resulted in a further augmentation of the defendants' settlement offer, and on this basis the litigations were concluded towards the end of 1959.

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On September 8, 1960, the Murchisons filed in this Court a derivative action on behalf of Alleghany, Murchison v. Kirby, 60 Civ. 3511, which attacked the aforesaid settlement as fraudulent. They included among the defendants Mr. Phillips, the late Allan P. Kirby, and his son, Fred M. Kirby, who is one of the defendants in the present action. Mr. Phillips appeared pro se in his own defense. After trial, Judge Dawson entered judgment for all defendants in a decision reported as Alleghany Corp. v. Kirby, 218 F.Supp.164 (S.D.N.Y. 1963), aff'd, 333 F.2d 327 (2d Cir. 1964), aff'd en banc, 340 F.2d 311 (1965).

The so-called "fee litigation" now pending before Judge Tenney involves Mr. Phillips' claim for the alleged value of the services he rendered in defending himself pro se in Alleghany v. Kirby. According to the papers filed in the "fee litigation," Mr. Phillips first broached his claim to "fees" by means of a motion filed with Judge Dawson in the Alleghany v. Kirby action on December 12, 1963. The Court rejected the motion because it had not been adequately served.

Mr. Phillips renewed his motion in September 1964, but withdrew it by stipulation on October 13, 1964. On the same day, he filed a complaint against Alleghany in the New York State Supreme Court, New York County (Index No. 15360/1964), seeking payment of his "fees". Alleghany promptly moved to dismiss the complaint, and in early January of 1965 it was dismissed by stipulation.

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During this period the question of attorneys' fees for the prevailing parties in Zenn had been held in abeyance pending certain appeals in Alleghany v. Kirby. Finally, on May 7, 1965, Mr. Justice McGivern made his fee awards, including an award constituting "fair and adequate compensation for the Graubard-Brussel-Phillips group . . ."

Zenn v. Anzalone, 46 Misc.2d 378, 380, 259 N.Y.S.2d 747, 750 (Sup.Ct. N.Y.Co. 1965).

After payment, Mr. Phillips began a series of judicial attacks designed to upset the Zenn settlement. Initially, he filed on February 4, 1966 an amicus brief in the Supreme Court of the United States which had granted certiorari in the Alleghany v. Kirby case, sub nom. Holt v. Kirby, 381 U.S. 933 (1965). The Supreme Court subsequently dismissed the petition for certiorari as improvidently granted. Holt v. Alleghany Corp., 384 U.S. 28 (1966).

On June 7, 1966, a suit was instituted in the Southern District of New York sub nom. Smith v. Fitzsimmons, S.D.N.Y. 66 Civ. 1938, in which Mr. Phillips acted as a "consultant" to the plaintiff and to his attorney, Robert L. Bobrick, Esq. The complaint charged that the Zenn settlement had been procured by a fraudulent conspiracy among, inter alia, Mr. Fitzsimmons, the Referee and Special Master, and the late Allan P. Kirby.

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On February 7, 1967, Judge Bonsal granted the defendants' motion to dismiss the complaint. His opinion said:

"This action which seeks to reopen the Alleghany litigation on the basis of conclusory and unsupported allegations of fraud hardly appeals to the conscience of a court of equity, particularly if there has been a solicitation of Alleghany stockholders, participated in by Mr. Phillips, for the purpose of bringing the action."* Smith v. Fitzsimmons, 264 F.Supp. 728, 734. (S.D.N.Y. 1967) aff'd, sub nom. Smith v. Alleghany Corp., 394 F.2d 38 (2d Cir) cert. denied, sub nom. Smith v. Kirby, 393 U.S. 939 (1968).

On April 17, 1967, Messrs. Phillips and Bobrick filed a motion in the Court of Appeals for the Second Circuit seeking relief from the judgment in Alleghany v. Kirby, alleging fraud similar to that asserted in Smith v. Fitzsimmons as well as newly discovered evidence. The Court of Appeals rejected this application, Smith v. Alleghany Corp., 394 F.2d 381 (2d Cir.), cert. denied, sub nom. Smith v. Kirby, 393 U.S. 939 (1968), stating:

"At most, the application stands on a porous foundation and in any case our consideration of it is barred by reason of the litigation of the same issues in Smith v. Fitzsimmons and their determina-

* Emphasis supplied here and elsewhere throughout unless otherwise indicated.

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tion by Judge Bonsal on summary judgment sought by plaintiffs themselves.

"All the matter put in support of the so-called 19(c) motions was or could have been presented to Judge Bonsal and may not be held back and subsequently used as the basis for relitigation of the same issues. The motions must be, and are denied." (394 F.2d at 394-95)

According to papers filed by Mr. Phillips in the pending "fee litigation" he thereafter addressed to John E. Tobin, Esq., a director of Alleghany and a defendant in this action, a request that Alleghany and IDS pay his "fees" for his pro se services in Alleghany v. Kirby. This request was refused, and the "fee litigation" ensued.

II. Alleghany's Acquisition of Control Over The New York Central

Mr. Phillips also was active in several cases in the mid-1950s which involved Alleghany's acquisition of control over the New York Central Railroad in 1954 and subsequent orders by the ICC which authorized Alleghany as a company regulated by the ICC to issue convertible preferred stock in exchange for its outstanding cumulative preferred stock.

Alleghany had first been made subject to the ICC's regulatory supervision in 1945 when it acquired control of the Chesapeake & Ohio Railroad. Chesapeake & Ohio Ry. Purchase, 261 I.C.C. 239, 262 (1945). Subsequently Alleghany disposed

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of its stock in the C. & O., but shortly thereafter it acquired control of the New York Central Railroad ("Central"). Alleghany and Central then applied to the ICC to have Alleghany's status continued as a non-carrier considered to be a carrier for purposes of regulation under the Interstate Commerce Act. Louisville & J.B. & R. Co. Merger, 290 I.C.C. 725 at 726 (1955).

On March 2, 1955 Division 4 of the ICC granted the application that Alleghany still be considered as a carrier subject to ICC regulation. Mr. Phillips intervened when the Docket came on for review before the full Commission. On May 24, 1955, the full Commission affirmed Division 4. Louisville & J.B. & R. Co. Merger, 295 I.C.C. 11 (1955). The Commission also held, in reaching its decision, that Alleghany's acquisition of control of Central did not require Commission approval. (295 I.C.C. at 17).

On February 18, 1955, Alleghany had filed with the ICC another application seeking permission to issue a new 6% Convertible Preferred Stock in exchange for its then outstanding cumulative 5-1/2% Preferred Stock. Division 4 granted its approval on May 26, 1955, Alleghany Corp. Stock, I.C.C. Finance Docket No. 18866, and on June 22 the full Commission denied a request by Mr. Phillips for reconsideration. Alleghany

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Corp. v. Breswick & Co., 353 U.S. 151, 158 (1957) which describes the Commission's action.

On June 6, 1955, Breswick & Co. and Mr. Phillips filed a complaint in the Southern District of New York, sub nom. Breswick & Co. v. United States. They sought an injunction directing the ICC to vacate its orders which had continued Alleghany's status as a "carrier" and which had approved the exchange of the preferred stock.

A three-judge panel was convened, pursuant to the Urgent Deficiencies Act, to hear the case. On July 21, 1955, it granted a temporary injunction, Breswick & Co. v. United States, 134 F.Supp. 132 (S.D.N.Y. 1955), and on November 18, 1955, a permanent injunction, Breswick & Co. v. United States, 138 F.Supp. 123 (S.D.N.Y. 1955).

Alleghany took a direct appeal to the Supreme Court, which reversed. Alleghany Corp. v. Breswick & Co., 353 U.S. 151 (1957), holding that Alleghany was properly to be treated as a carrier subject to ICC supervision. The Supreme Court's remand directed the District Court to consider the plaintiff's claims that the proposed new preferred stock as approved by the Commission, violated the Interstate Commerce Act.

On remand from the Supreme Court, the District Court

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held, contrary to the ICC's view, that the Commission was required to approve Alleghany's control of the New York Central before it could authorize the issuance of the new preferred shares. Breswick & Co. v. United States, 156 F.Supp. 227 (S.D.N.Y. 1957). Mr. Phillips as a plaintiff appeared in these proceedings pro se. Alleghany again appealed to the Supreme Court, which again reversed. Its second remand directed the District Court to consider "the only claim that was left open at this Court's prior disposition of this litigation, to wit, whether 'the preferred stock issue as approved by the [Interstate Commerce Commission] was in violation of the Interstate Commerce Act.'" Alleghany Corp. v. Breswick & Co., 355 U.S. 415, 416 (1958).

After further hearings the District Court granted the defendants' motion to dismiss the complaint and to vacate its injunction. Breswick & Co. v. United States, 160 F.Supp. 764 (S.D.N.Y. 1958).

While the Breswick proceedings were pending, the Securities and Exchange Commission also held hearings on the proposed exchange of preferred stock. In re Alleghany Corporation, S.E.C. Docket No. 812-987, 88, 998 (1956). The legal significance of the jurisdictional conflict between the ICC and SEC is discussed elsewhere in defendants' papers. Here we note aspects of the litigation performance of Mr. Phillips who appeared before the SEC in opposition to the proposed exchange.

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An affidavit, verified by J. Howard Carter, Esq., on January 10, 1961, and filed in the Alleghany v. Kirby litigation (Annexed herein as Exhibit A₁), sets forth the following excerpts from the transcript of the hearings before the SEC's trial examiner:

"During the course of hearings before an SEC Examiner Phillips stated:

(p. 1230-31) 'I am going to ask this counsel (David Hartfield, Esq. of the firm of White & Case) be brought before the bar of the Commission, Your Honor, because there have been two tactics employed here that have never been employed in any case before this Commission. I am going to suggest to the Commission that Mr. Hartfield and Mr.'

'HEARING EXAMINER: Mr. Phillips, let me do a little talking, please * * *
I am not going to lecture any lawyer in this case until I think his demeanor justifies such a thing.'

(p. 1228) 'Your Honor, I move you disqualify yourself from any further proceedings here on the ground of bias and prejudice if you do not strike that from the record.'

* * *

'HEARING EXAMINER: I refuse to do that.'

(p. 1401 et seq.) 'Your Honor, just now, in your presence, this reporter accused me of being a liar. You heard it, did you not, sir?' * * *

'HEARING EXAMINER: You had accused, provoked in my judgment, some retort from this present court reporter.' * * *

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'MR. PHILLIPS: Now, Your Honor, I move to disqualify this reporter from taking any further transcript in this proceeding on the ground he has demonstrated, in your presence, personal animosity to me, and that your own tolerant attitude, Your Honor, about this kind of conduct by counsel here has encouraged this reporter to engage in this sort of Donnybrook and we all know this reporter's services are being taken by Alleghany Corporation and by Mr. Sheriff's office and this reporter has no right to break into my personal colloquy with Mr. Lohren during a recess here.

'I am not interested in his views. I don't care to have them, and in your presence he accused me of being a liar, and you unjustly, and without citing a single statement by me, say I provoked it, and you know that is not true, Your Honor.'

'HEARING EXAMINER: I do think it is true, and we won't have another word on this.'

'MR. PHILLIPS: I move to disqualify him, Your Honor, and I ask you certify to the Commission this record.'

'HEARING EXAMINER: I won't certify it and I deny the motion.'

'MR. PHILLIPS: Your Honor, I don't think I can continue any further in this proceeding, because you are demonstrating to me you will not control the conduct of the participants in this hearing, even the reporter.'

'HEARING EXAMINER: Do you wish to return to the cross examination or not?'

'MR. PHILLIPS: I do not care to pursue any cross examination before Your Honor and this reporter, in view of the ground I cannot get a fair hearing in the circumstances of this case.'

'HEARING EXAMINER: Mr. Phillips, I had occasion yesterday to ----'

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'MR. PHILLIPS: Your Honor, excuse me.'

'HEARING EXAMINER: I warned you that your attitude toward me, in refusing to continue the cross examination of that witness, in my opinion, might be grounds for excluding you from further participation in this record. I think what has just transpired is another instance of that, and if I get another outburst from you like we have just had, I am going to move in that direction.'

'MR. PHILLIPS: Your Honor, I accept your remarks and I am withdrawing from the hearing.'

'HEARING EXAMINER: That is your option.'

'MR. SHERIFF: May I just make certain whether Mr. Phillips is withdrawing from the hearing or whether he expects to reattend?'

'MR. PHILLIPS: I am withdrawing from the hearing at this time. I will call to Your Honor's attention, if I may, sir, that six years ago, when you became a Trial Examiner, in a hearing that had previously been presided over for some three months by another Trial Examiner, I asked you the question whether you had read the record before taking the stand as Trial Examiner.'

'HEARING EXAMINER: What has that to do with the present situation?'

'MR. PHILLIPS: I moved to disqualify you, Your Honor. The Commission did disqualify you. I hesitated very much before coming into this proceeding before you, whether I should make an application of personal bias and prejudice, based on the events that occurred six years ago. I didn't do so, because I didn't want to have any extraneous issues.'

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'HEARING EXAMINER: I don't ever recall having been disqualified in anything by the Commission.'

'MR. PHILLIPS: The record will speak for itself.'

'MR. SHERIFF: Your Honor, before Mr. Phillips leaves the room, I would like to state clearly that I think Your Honor has conducted this hearing in the most impartial manner, despite, I think, continued provocation on the part of Mr. Phillips. I would also like to say, Your Honor, that I think that the attitude of Mr. Phillips in questioning the integrity of Your Honor, questioning the integrity of the court reporter, and in questioning the integrity of I think every person in this room, except myself for some reason, leaves me to wonder what kind of a case we are dealing with that this man has brought. I mean, how serious can this case be against the preferred stockholders when we have a man whose conduct is so irrational. Can he really be serious in these charges that he is making about the fairness and unfairness of this plan? I mean, it just seems to me that we preferred stockholders have had to bear here with a man, and I invited him to stay here to listen to this, with a man whose attitude, whose reaction -----'

'HEARING EXAMINER: He has walked out on you. He has gone, left the hearing room.'

'MR. SHERIFF: That is right -- whose attitude and reaction to people are such as to throw considerable credibility -- not credibility, but throw considerable doubt on whether this application of his for intervention is made for any logical or rational reason, but is an aspect of the complete irrational attitude which he has toward all persons.'"

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This did not, however, end Mr. Phillips' challenges to the ICC's actions with respect to the New York Central.

In 1959, Mr. Phillips and others filed a complaint in the U. S. District Court for the District of Columbia sub nom. Neisloss, Phillips, et ano. v. Arpaia, et al, Civ. No. 2086-59. The case went forward under an amended complaint which alleged, inter alia, that the ICC had failed properly to investigate the matter of the Central by reason of "pressure" from "the White House" and bribes allegedly offered by Alleghany and some of its officers.

Mr. Carter's aforesaid affidavit filed in Alleghany v. Kirby quotes the relevant portions of Mr. Phillips' amended complaint as follows:

"Some of the means, among others, used by Young, Kirby and Alleghany to exert undue and improper influence upon the Interstate Commerce Commission were: rendering of services and giving of considerations of value to members of the Interstate Commerce Commission and other officials in a position to influence the Commission's actions; ex parte representations covertly made to members of the Interstate Commerce Commission and other officials in a position to influence the Commission's actions; removal of independent members of the Interstate Commerce Commission critical of Alleghany's acts and their replacement by Commissioners favorable to Young, Kirby and Alleghany; threat of removal communicated from officials of the White House staff to members of the Commission critical of Young's, Kirby's and Alleghany's acts; intercession in the Commission's decision by high government officials through ex parte communications to members of the Commission.

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"16. Some of the wrongful acts and practices, among others, employed by Young, Kirby and Alleghany and persons affiliated with them to exert undue influence upon the Commission, include:

"a. Mr. Clayton Irwin was hired by Alleghany in July 1953 at \$20,000 a year as a 'contact' with Dr. Milton Eisenhower. During 1954 Dr. Eisenhower accepted free airplane transportation at the expense of Alleghany. The value of this transportation has been estimated by Robert R. Young's former financial analyst, William J. Hudson, Jr., to be in excess of \$5,000. This transportation was used by Dr. Eisenhower in February, March, April, June, July, August, October and November, 1954, for personal purposes. Dr. Eisenhower visited Young at the latter's home in Palm Beach and Newport, Rhode Island, during this same period. The friendship between Dr. Eisenhower and Young was made known to the President and to persons on the Commission or in a position to influence its action, and did influence its determinations in the matter of Alleghany's acquisition of control of the New York Central. At this time Dr. Eisenhower was serving with Sherman Adams, Assistant to the President, as a member of the President's Committee on the Executive Agencies.

"b. The White House, through Mr. Sherman Adams, made clear to one or more of the Commissioners, including Commissioner Owen Clark, that it did not want an investigation of Alleghany. Adams' role is further apparent in removals and appointments of Commissioners during this period. Prior to the vote of the Commission in April 1954 not to investigate the Alleghany transactions, Adams asked Chairman J. Monroe Johnson, a Democrat, who at that time favored the investigation, for his resignation on the ground that he was then 75 years old. Johnson did not resign, but during this period took an off-the-record trip to Florida to confer with Young. He subsequently voted to deny the investigation and the demand for his resignation was dropped.

"Nine months later, on January 4, 1955, Commissioner Charles D. Mahaffie, who had voted to

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investigate Alleghany, was retired by a Presidential Directive announced by Press Secretary Haggerty, because he had 'passed the age of 70,' in spite of Johnson's retention past that age. Knudson, the other Commissioner who sought to investigate Alleghany, although a Republican, was not reappointed. Commissioner Mitchell, the sole Democrat to be reappointed by the President in this period, had voted against the investigation. In 1957, Arpaia, the other remaining Democrat who had voted against the investigation, was also reappointed.

"c. On February 23, 1954, the New York law firm of Lord, Day & Lord, the firm with which Attorney General Brownell was associated prior to his appointment, was retained to act as Alleghany's New York counsel in the proxy fight to obtain control of the New York Central. The firm demanded a minimum fee of \$100,000 when no litigation was pending and were actually paid \$250,000 for four months' service in 1954. It was Brownell's unprecedented opinion which made it possible to remove Commissioner Mahaffie, Chairman of Division 4, at a time when important and contested Alleghany applications were pending before that Division. Brownell has returned to Lord, Day & Lord and has, on at least one occasion, interested himself in the pending Alleghany litigation. The total fees paid Lord, Day & Lord for services in these and related matters to date exceed \$900,000.

"d. During 1954, Burton K. Wheeler and his son, Edward K. Wheeler, as counsel for Alleghany, Young and Kirby, had ex parte communications with Commissioners Johnson, Mitchell, Arpaia and Clark, during the course of which these Commissioners approved, prior to public adjudication, Young's plans to take control of the New York Central without investigation thereof.

"e. While Secretary of the Air Force, Harold Talbott aided Alleghany and Young, Talbott called William E. Levis, a New York Central Director, and urged him to go along with Young instead of continuing to support White, the incumbent President of the Central. In return for such services, in

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1954 Alleghany purchased 25,000 shares of stock in Electric Auto-Lite (Talbott's company) on which Alleghany promptly incurred a loss of \$80,000. Clayton Irwin, a former business associate of Talbott's and at that time a \$20,000 Alleghany consultant, stated to Hudson, Young's financial analyst, that the purchase was for 'certain Washington reasons which cannot be discussed.'

"f. Subsequent to the Commission's various determinations in favor of Alleghany, Young and Kirby in 1954 and 1955, Commissioner Owen Clark was made a Vice President of the Chesapeake & Ohio Railway Company at an annual salary of \$50,000 and Commissioner Robert W. Minor was made a Vice President of the New York Central at an annual salary of \$55,000. Lawrence Horning, a Vice President of the New York Central, is assigned to Washington, D.C. for the purpose, among others, of contacting members of the Commission and Congress and providing them with services and entertainment at the expense of the New York Central.

* * *

"18. As a result of undue and improper influence, ex parte representations and use of means other than the recognized public processes of adjudication as aforesaid, the rulings of the Interstate Commerce Commission in April and May of 1954 refusing to investigate and declare illegal the transactions for the acquisition of control of the New York Central, were not rendered on the objective merits of the record before the Commission."

The Neisloss plaintiffs sought an order from the District Court vacating the Commission's orders with respect to the Central and directing the Commission to hold further hearings. In an unreported decision, Judge Tamm of the District Court dismissed the Complaint, which the Court of Appeals for the District of Columbia Circuit affirmed. Neisloss v. Bush, 293 F.2d 873 (D.C.Cir. 1961).

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III. Challenges to the IDS - Mutual Fund Relationships

In 1961 the Murchison family of Texas and interests associated with them won a proxy contest for control of Alleghany which resulted in the displacement, for a time, of the late Allan P. Kirby as chief executive officer of Alleghany. Mr. Kirby regained office in 1963. These events and a related sale of Alleghany stock by the Murchison interests to Gamble-Skogmo, Inc. in 1962 prompted still another wave of litigation by Mr. Phillips.

Mr. Phillips contended in several actions in the courts and in proceedings before the SEC that the various changes in "control" of Alleghany had brought about automatic terminations of the investment advisory and principal underwriting contracts between IDS and the various mutual funds for which it served as investment advisor. Mr. Phillips, appearing pro se in these cases, was uniformly unsuccessful. See Willheim v. Murchison, 342 F.2d 33 (2d Cir.), cert. denied, 382 U.S. 840 (1965); Phillips v. SEC, 388 F.2d 964 (2d Cir. 1968); and Investors Mutual, Inc., S.E.C. File No. 812-1550.

During this same period, parties unrelated to Mr. Phillips brought in the Southern District of New York a derivative action on behalf of one of the IDS mutual funds alleging improper domination of the fund's directors by IDS.

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A proposed settlement was reached, and notice of a hearing on the settlement before Chief Judge Ryan was given to the fund's shareholders. Of the fund's 270,000 shareholders, only two appeared to oppose -- Mr. Phillips, who appeared pro se and claimed ownership of 88 shares, and his mother-in-law, Mrs. Else Willheim, who claimed ownership of 30 shares.*

In February of 1964 Chief Judge Ryan approved the settlement, Glicker v. Bradford, 35 F.R.D. 144 (S.D.N.Y. 1964), and made the following comment about the objectants:

"Objectants' bold assertion that the settlement here compares unfavorably with a settlement negotiated by present counsel with IDS on behalf of Investors Mutual Inc. (one of the other IDS advised funds) is incredible, in view of the fact that one of the objections raised by these very objectants to the settlement of that suit was that it was not as favorable as the settlement under consideration! If such an inconsistent and irresponsible position were just an isolated instance it might be shrugged off as stemming from ignorance on the part of one not trained in the law, but it is not so isolated; it is one of the many fallacious arguments (at times accompanied by unwarranted and unjustified personal remarks directed to counsel by objectant Phillips) with which objectants have sought 'to distract us from important judicial business.' Unfortunately, the consideration of the objections raised here, although we have found them to be totally worthless, have taken up a great deal of the time of the Court and delayed its determination. This was not fair to anyone, including the shareholders. See concurring separate opinion in Ackert v. Pelt Bryan, 2nd Circuit, 299 F.2d 65." (35 F.R.D. at 158-9.)

* Mrs. Willheim was one of the plaintiffs in the Willheim v. Murchison case described in the text above.

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In 1968 another suit was filed sub nom. Smith v. Murchison, S.D.N.Y. 68 Civ. 3791. This was a derivative action brought in behalf of Alleghany, demanding damages from various individuals who had served as officers or directors during the period the Murchison interests controlled the company. Mr. Phillips was involved as a "consultant" to the plaintiff who alleged that the defendants had improperly profited from their alleged sale of a controlling interest in Alleghany to Gamble-Skogmo in 1962. Two years after the suit was filed a Mr. Haberman was substituted as plaintiff in place of Mr. Smith to avoid a transfer of the case to the District Court for the Northern District of Texas. Judge Gurfein ultimately granted summary judgment for defendants, Haberman v. Murchison, 331 F.Supp. 180 (S.D.N.Y. 1971), and the Second Circuit affirmed, Haberman v. Murchison, 468 F.2d 1305 (2d Cir 1972). The opinion of the Court of Appeals commented:

"The core issue, to which the other claims are mainly incidental, relates to whether appellees realized, upon the sale by them of shares of Alleghany, a premium attributable to a transfer of management control. The SEC, considering the control issue on the same evidence as was later before the District Court, determined that there was no transfer of control; and that decision was sustained upon direct review in this court. Phillips v. SEC, 388 F.2d 964 (2d Cir. 1968). Although the issue arises in this litigation in a common law and differing statutory context, the District Court reached the same conclusion. We find no warrant for disturbing its judgment in this or any other of its aspects; and, for the reasons hereinafter appearing, we affirm the District Court's dismissal of appellant's action." (468 F.2d at 1308)

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IV. The 1966 Exchange of Alleghany
Stock for New York Central Stock

Most v. Alleghany, S.D.N.Y. 66 Civ. 962, was an action commenced on April 4, 1966 by Elizabeth Most "representatively and derivatively on behalf of all the shareholders" of Alleghany. Ms. Most named as defendants Alleghany and the late Allan P. Kirby, then the chief executive officer of Alleghany.

The suit arose out of a tender offer made by Alleghany to its shareholders on March 28, 1966 in which it offered to exchange shares of The New York Central which it owned for shares of Alleghany preferred and common stock held by the shareholders. The complaint in Most sought to enjoin the consummation of the exchange. Judge Murphy denied a motion for a preliminary injunction on April 7, 1966, and the Court of Appeals affirmed without opinion in an unreported decision.

The exchange went forward, but Ms. Most did not abandon her complaint. On December 16, 1967 she filed an amended complaint. Mr. Phillips participated as a "consultant" to Bennett Frankel, Esq., attorney for Ms. Most. The complaint contained four "counts", including one so poorly drawn that Judge Wyatt later commented that "[i]t is impossible to determine on what theory plaintiff is proceeding."

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Judge Wyatt dismissed this action on February 17, 1970. A copy of Judge Wyatt's opinion is included in the Appendix of cases.

Mr. Phillips apparently served as a "consultant" to plaintiff Morris Smith in another derivative action filed on behalf of Alleghany in 1969 which also attacked the 1966 exchange offer. Smith v. Kirby, S.D.N.Y. 69 Civ. 1947. On February 17, 1970 Judge Wyatt also dismissed this action.

V. Miscellaneous Cases

(A) - In Rosen v. Alleghany Corp., Mr. Phillips and two other plaintiffs brought a five-count complaint against Alleghany and the late Robert R. Young. Mr. Phillips sued both as a member of a stockholders' protective committee (represented by counsel) and individually, appearing in that role pro se. The five claims primarily related to an allegedly false and misleading proxy solicitation by the defendants. The case was dismissed for failure to prosecute.

Mr. Phillips then sought vacatur of the dismissal as to two of the five counts, in a case reported as Rosen v. Alleghany, 172 F.Supp. 317 (S.D.N.Y.), aff'd, 272 F.2d (2d Cir. (1959)). He contended that he had not received notice of the hearing held to determine if dismissal should be ordered. Judge Sugarman dealt with this argument as follows:

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"Movant Phillips now claims that he never received a card from the clerk notifying him of this review hearing or notice of the order made thereon. Assuming this to be so, notice of the hearing was duly published and Phillips carefully avoids stating that he knew nothing of it or of its result. The suggestion is incredible that Phillips pro se learned nothing of the review hearing and confidential order made thereon from the attorneys who represented Phillips and others as members of the stockholders' protective committee." (172 F. Supp. at 31c).

(B) - In Phillips v. Bradford, 228 F.Supp. 397 (S.D.N.Y. 1964), Mr. Phillips appeared pro se in a derivative action brought on behalf of one of IDS' mutual funds against IDS and others. The defendants sought dismissal on the grounds that a decision in Ackert v. Ausman, 20 App.Div.2d 850, 247 N.Y.S.2d 999 (1st Dep't 1964), was res judicata on the issues raised in the complaint. Ackert had been terminated by a court-approved settlement following a fairness hearing before a court-appointed referee.

Judge Ryan granted the motion to dismiss, commenting in his opinion that:

"It is undisputed that not only as a shareholder of Mutual was plaintiff given notice of the settlement and State Court hearings on the settlement but that he filed an intention to appear at the hearing and a memorandum containing the charges of fraud and collusion, and then failed to appear, having made no request for an adjournment or extension of time. The hearing was held on April 9, 1963 and plaintiff's mother-in-law Willheim, who had also filed a notice of intention to appear and for whom plain-

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tiff had been acting as 'attorney in fact,' was represented by counsel who opposed the settlement on her behalf. On closing the hearing, the Referee stated that it could be reopened for good and sufficient cause. Plaintiff sought no such reopening until after the Referee made his decision." (228 F.Supp. at 398)

Having this ignored his State remedies:

"On May 31, 1963, Phillips filed a 'bizarre proceeding' in the Court of Appeals of this Circuit to enjoin the defendants from pleading as res judicata the settlement proceedings before the State Court, Ackert v. Bryan 2nd Cir. #27240; on July 18, 1963, the Referee's report was filed holding the settlement fair, reasonable and adequate; on July 31, 1963, Phillips filed the instant complaint and two days later, a petition to intervene in the State Court proceedings, attempting to excuse his failure to appear; at the hearing this was denied on August 23, 1963 because there was 'no merit to the arguments put forward by this movant.' An appeal from this denial has been dismissed."* (228 F.Supp. at 398-99).

Judge Ryan disposed of Mr. Phillips' charges that the settlement was tainted by fraud as follows:

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- * In the decision of the Second Circuit determining the "bizarre proceeding" to which Judge Ryan refers, Judge Kaufman filed a concurrence in which he said:

"He [Phillips] hurls thorough, unsubstantiated charges at reputable counsel, contending that they fraudulently and corruptly entered into a settlement agreement in a companion case in the New York courts which, had this been known to our court, would have necessitated our reaching a different conclusion from that recorded at 299 F.2d 65, rehearing denied, 299 F.2d 72 (1962). * * * What does concern me is his cavalier and outrageous use of the federal courts -- and indeed other forums -- for his unrestrained attacks upon the personal veracity and professional competence of counsel.

* * *

(Footnote continued on following page)

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"The details of the charges of excessive fees, fraud on the stockholders and inadequate consideration are now lodged in some alleged loans and guarantees, factual details which plaintiff did not resort to, when attacking the settlement in the State Court.

"There is no question but that plaintiff knew of these alleged loans upon which he has based the second count of his present complaint as far back as 1960 and that he did not appear to urge them in opposition to the settlement. This knowledge is a matter of record. First, in 1960, Phillips was Chairman of the Investors Diversified Services, Inc. Finance and Law Committee, when the questioned acts allegedly took place and, as such Chairman, he was aware of them and of the fact that a Special Committee upon counsel's recommendation filed a report concluding that no action should be taken -- a report which was adopted by the Board of Directors of Mutual. Second, these loans and the facts surrounding them were disclosed in Ackert v. Ausman, D.C., 217 F.Supp. 934 (since then transferred to Minneapolis) as the basis for a proposed amended complaint adding the two Murchisons as parties-defendants; the amendment, however, was never made upon plaintiff's counsel's conclusion after reading the report of the Special Committee that there was no merit to the charges. Third, Phillips has repeatedly unsuccessfully attempted to raise the matter in the Supreme Court in Murchison v. Alleghany Corp., 27 Misc.2d 290, 210 N.Y.S.2d 153 without disclosing to the Court the report of the Special Committee, a maneuver which the Court found 'regrettable' (27 Misc.2d 290, 295, 210 N.Y.S.2d 153), and again and again in his numerous suits in this and other Courts. Finally, these very facts were in two exhibits before the Referee on the settlement hearing; and were used by Willheim in opposition to the settlement and as a basis for reopening the Referee's hearing, and as a basis for Phillips' motion to intervene, all of which were denied." (35 F.R.D. at 401-02).

(Footnote continued from preceding page)

"Perhaps we are correct in not imposing any penalty upon Mr. Phillips for his conduct, but I strongly feel that an express reprimand is warranted." (A copy of Judge Kaufman's opinion, dated June 21, 1963, is annexed hereto as Exhibit A₂).

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(C) - In Phillips v. Murchison, S.D.N.Y. 61 Civ. 713, (1966), Mr. Phillips sued pro se in his individual capacity alleging fourteen counts of libel and slander against John D. and Clint W. Murchison.

Judge Dawson dismissed eight of the counts on May 8, 1964. Chief Judge Ryan, in the decision reported as Phillips v. Murchison, 252 F.Supp. 513 (S.D.N.Y. 1966), dismissed the remaining counts on March 25, 1966 on the ground that they involved comments privileged as reports of Judicial proceedings.

Mr. Phillips, in the course of the proceedings before Judge Ryan, had tried to create a question of fact as to whether the alleged libels had occurred before or after the institution of the judicial proceedings. In so doing he challenged the truth of affidavits submitted by several of defendants' attorneys. The Court treated these charges as follows:

"Plaintiff seeks to create an issue of fact out of nothing more than his bald statement that there is an issue of fact as to the truthfulness or falsity of counsel's statements. All he discloses by this challenge to the credibility of counsel's statements is a baseless hope that by cross examination he will be able to establish that both former and present counsel for Murchison are not truthful. He has shown no facts which would form the basis for reaching the conclusion that counsel did not serve the summons and complaint in the Freeman suit when he swears he did. Certainly this Court is not to conclude without substantial basis for doing so that two members of its bar of experience and good reputation have perjured

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themselves and deceived the Court in order to gain some procedural advantage over their adversary. No genuine issue of the credibility of these witnesses requiring a trial has been raised; summary judgment will lie in such case" (252 F.Supp. at 519)

The Court of Appeals for the Second Circuit subsequently reversed Judge Ryan as to three counts and remanded for further proceedings. It held that opinions rendered by New York state courts after Judge Ryan's decision had changed the law applicable to the issue of privilege, Phillips v. Murchison, 383 F.2d 370 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968). According to Mr. Phillips' Memorandum of March 6, 1975 in Opposition to Defendants' Motion for a Protective Order at p. 20 the case eventually was ended by a settlement between the parties.

(D) - Phillips v. Bradford, S.D.N.Y. 73 Civ. 2118, is a pending action in which Mrs. Lily Phillips, Mr. Phillips' wife is suing as a derivative plaintiff on behalf of Investors Mutual Fund Inc., one of the IDS mutual funds. The defendants include IDS, two other IDS mutual funds, and ten individuals, nine of whom are directors of all three of the mutual funds. Mrs. Phillips' complaint attacks the funds' dealings in the stock of Penn Central, including some of the same transactions referred to in Mr. Phillips' complaint in this action.

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PART II

In addition to his many cases involving Alleghany and those associated with it, Mr. Phillips also has been active over the years in many other litigations. Some of these actions are described in the paragraphs following:

I. The Reorganization of United Corporation

On August 14, 1943, after hearings, the Securities and Exchange Commission issued an order under the Public Utilities Holding Company Act requiring the United Corporation 1) to cease to be a holding company; 2) to reduce its capitalization to one class of stock; and 3) to proceed with due diligence to comply with the order. In Re United Corp., 13 S.E.C. 854 (1943).

Mr. Phillips repeatedly appeared in the Court of Appeals challenging Commission orders relative to the reorganization. In Phillips v. SEC, 153 F.2d 27 (2d Cir.), cert. denied, 328 U.S. 860 (1946), the court denied each of his contentions in an opinion by Judge Charles Clark which concluded in these terms:

"In the course of the proceedings before the Commission, petitioner brought forth various conditions which he sought to engraft upon the plan if it were approved. His proposals related to

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cumulative voting, quorum requirements, and representations of minority groups at shareholders' meetings. They had no bearing on the approval of the present plan; and the Commission was justified in declining to consider them at this time. In fact, they appear designed to secure for petitioner that position in company affairs for which he waged a proxy battle only to lose it at the company's annual meeting." (153 F.2d at 32)

In the same case Mr. Phillips contended that he had been denied a fair hearing by the SEC and that illegal ex parte communications had taken place between United's president and members of the Commission. Judge Clark disposed of these assertions as follows:

"The petitioner's last major contention is that he was denied a fair hearing. He appeared at six hearings on the plan prior to the final hearing on November 6, 1944, which was held at his request at which he filed briefs and made an extensive oral argument. The minutes of the hearing show that he there raised in substance all of the objections now urged. He contends further that the Commission made an ex parte adjudication on the question of the necessity for a shareholders' vote. This is based upon conversations between United's president and members of the Commission or its staff, developing the latter's view that such a vote was inappropriate under the circumstances. These conversations seem to us no more than legitimate prehearing conferences of the kind which the commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man. " (153 F.2d at 32)

In a subsequent proceeding, Phillips v. SEC, 156 F.2d 606 (2d Cir. 1946), Judge Clark again denied all of Mr. Phillips' contentions and characterized his arguments as follows:

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"On the merits petitioner stakes his position upon certain broad generalities of the Act. . . .

"Outside of his deductions from the statutory generalities, petitioner points to no direct injury to himself or other stockholders, and nothing to suggest that they will not be in fact benefited, as apparently they assume by their failure to object or seek review.

". . . Certainly we must have a better base than the statutory generalities to justify us in denying all discretion here to the Commission in circumstances where both expertness and wisdom are so greatly called for." (156 F.2d 608-09)

In a third appearance in the Second Circuit, Phillips v. SEC, 171 F.2d 180 (2d Cir. 1948), Judge Clark again rejected Mr. Phillips' objections to the Commission's actions, identifying him as one of the causes for the "long drawn out" nature of the United proceedings:

"It is true that these proceedings have, all too unfortunately, been long drawn out; but we are in no position to appraise the reasons beyond observing the obvious fact that this petitioner has had something to do with that result by his several fruitless efforts to transfer the proceedings to the courts."
(171 F.2d at 183)

Two years later, Mr. Phillips decided to take to the Court of Appeals in Washington still another grievance ostensibly arising out of United's reorganization. Phillips v. SEC, 185 F.2d 746 (D.C.Cir. 1950). This time he contended that the Commission had not acted with sufficient diligence

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in bringing about compliance with its 1943 order and that the court should substitute a reorganization plan of Mr. Phillips' devising. The court refused, stating:

"In our view, the Act neither compels nor justifies the conclusion the petitioner asks us to reach. Sections 11(c) and 11(d) were designed to enable the Commission to deal with a recalcitrant company. But Congress could hardly have intended that an order entered by the Commission should become a trap closing down relentlessly at the end of a two-year period, against the judgment of the Commission, contrary to the provisions of the order entered, and to the damage of the very interests which Congress was endeavoring to protect - the public interest and that of investors. To give any such interpretation to the statute might well tend to cause the Commission to refrain from issuing any order in a particular case until the situation became ripe for complete and immediate enforcement."
(185 F.2d at 750)

Downing v. SEC, 203 F.2d 611 (D.C.Cir. 1953), rev'd in part and aff'd in part sub nom. General Protective Committee v. SEC, 346 U.S. 521 (1954), involved an attack by Mr. Phillips upon a further Commission order entered in the United proceeding on June 26, 1951. The order specified that certain of its provisions were not to be operative until approved by an order of "an appropriate United States District Court." (203 F.2d at 614) Mr. Downing and Mr. Phillips, identifying himself as a stockholder and "attorney in fact for 22,081 other stockholders" of United, challenged some parts of the order, but asked the Court of Appeals to order into effect those provisions of the Commission order which the SEC had made contingent upon approval by a District

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Court. The Court of Appeals, holding that it had jurisdiction over the entire order, affirmed the Commission's action and ordered into effect those portions of the order which the Commission had made dependent upon District Court action. The Supreme Court, in an opinion by Mr. Justice Douglas, reversed in part, holding that the Court of Appeals had improperly asserted jurisdiction over the provisions of the plan which the Commission's order had made dependent upon action by a District Court. (346 U.S. 521, 536.)

II. The Pennsylvania Railroad Proxy Contest

In Guadiosi v. Franklin, 166 F.Supp. 351 (E.D.Pa. 1958), appeal dismissed, 269 F.2d 873 (3d Cir.), cert. denied, 361 U.S. 902 (1959), Mr. Phillips, along with several co-plaintiffs, sought equitable relief to protect Mr. Phillips' individual rights in a proxy contest of the Pennsylvania Railroad Company. This complaint also included class action counts which sought to impose liability on individual defendants, officers and directors of the railroad, for an allegedly improper expenditure of corporate funds during the proxy contest. Judge Kraft found after trial in the District Court that the class action claim had been presented by the plaintiffs "in such haphazard fashion as to make it virtually impossible for the trial judge to make any just, proper determination." (166 F.Supp. at 352) He thus

ordered a rehearing of the class action claims, stating:

"I am persuaded that, in this legal melee over the proxy contest, the plaintiffs, in their zeal to assert adequately the rights of Phillips, have performed less than their full duty to the stockholders whom they represent in the class action and have inadequately presented their claim. It would be a grave injustice to all stockholders as well as to the defendant directors to determine the challenged expenditures on the present record." (166 F.Supp. at 353)

In a companion decision reported at 166 F.Supp. 353 the court denied the plaintiffs' plea for equitable relief, finding that Mr. Phillips was guilty of unclean hands and had engaged in conduct "knowingly, maliciously and intentionally violative of the applicable Rules of the Securities and Exchange Commission." (166 F.Supp. at 370)

III. Political Cases

(A)- Phillips v. Nixon, D.C.D.C. 74 Civ. 736:

In this case, now pending in the federal courts of the District of Columbia, Mr. Phillips, as chairman of the Committee for Fair Play for Voters and in his own right as a registered voter, and on behalf of all registered voters similarly situated, seeks a declaratory judgment that President Ford's appointment as Vice President was unconstitutional and that he thus is serving illegally in the Presidency. The District Court has dismissed the complaint, and Mr. Phillips has briefed an appeal to the Court of Appeals.

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(B)- Valenti v. Rockefeller, 292 F.Supp. 851 (S.D.N.Y. 1968), aff'd per curiam, 393 U.S. 406 (1969): In this case Mr. Phillips, acting both individually and as a member of the Committee for Fair Play for Voters, challenged the constitutionality of the New York statute under which former Governor Nelson Rockefeller had appointed Congressman Charles Goodell to fill the vacancy in the United States Senate created by the assassination of Robert F. Kennedy in June of 1968. A three-judge court dismissed the complaint.

(C)- In 1970 Mr. Phillips, appearing pro se and claiming to sue individually and as Chairman of the "Committee for Fair Play for Voters," instituted an action entitled Phillips v. Rockefeller, S.D.N.Y. 70 Civ. 4827. The complaint sought to prevent New York State officials from certifying the election of Senator James Buckley on the ground that he had obtained only a plurality, not a majority, of the votes cast in the 1970 election. Certification, according to Mr. Phillips, would affront the constitutional requirement that Senators be "elected by the people." Judge Edelstein dismissed the complaint on December 2, 1970, holding that the Court lacked subject matter jurisdiction and that the complaint failed to present a substantial federal question. Phillips v. Rockefeller, 321 F.Supp. 516 (S.D.N.Y.), aff'd, 435 F.2d 976 (2d Cir. 1970).

(D)- Committee for Fair Play to Voters v. Saxbe, S.D.N.Y. 74 Civ. 942 (C.E.S.): In this case, Mr. Phillips, acting individually and as chairman of the Committee for Fair Play to Voters, sought a declaratory judgment that William B. Saxbe's appointment as United States Attorney General was unconstitutional and that Mr. Saxbe be enjoined from discharging the duties of his office. On February 17, 1975 District Judge Stewart granted the Government's motion to dismiss the complaint for lack of standing.

IV. Reorganization of
The Baltimore & Ohio Railroad

On March 12 and 13, 1946 Mr. Phillips appeared before a three-judge panel of the U.S. District Court for Maryland, composed of Judges Soper, Chesnut, and Dobie. He charged, in effect, that Judge Chesnut had engaged in an improper telephone conversation in 1944 with Mr. Snodgrass, an officer of the B&O, and that said conversation resulted in a secret agreement.

When Mr. Phillips was unable to substantiate these charges, Judge Soper made the following statement, which is quoted in Mr. Carter's aforesaid affidavit filed in Alleghany v. Kirby as follows:

"I desire to add another word on behalf of the Court, and particularly on behalf of Judge Dobie and myself, since we have witnessed what

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is little short of an outrageous attack upon the integrity of a member of the Court. It needs no statement from any member of this Court, or any member of this bar, or this community, to justify the position of Judge Chesnut in this, or any other matter. And we regard the statements made before recess by Randolph Phillips, from which it might readily be inferred, if he did not distinctly say, that there was evidence of a clandestine agreement between Judge Chesnut and Mr. Snodgrass of the Baltimore & Ohio Railroad Company as entirely unjustified and something that, if he were a member of the bar of this Court, would subject him to discipline. It is not necessary to labor this matter through further discussion. The statements which have been made since this Court came back from recess, the excerpt from the only memorandum upon which Randolph Phillips relied in his accusations and innuendoes, show that they were utterly and entirely groundless and without foundation, and could not be made by anyone who had any care for making fair statements in public, especially in regard to a judicial officer."

According to Mr. Carter's affidavit, Mr. Phillips subsequently applied unsuccessfully to the Chief Judge of the Fourth Circuit for an order disqualifying Judges Soper and Chesnut from sitting further in the B&O matter, claiming that

"Circuit Judge Morris A. Soper and District Judge W. Calvin Chesnut, both sitting in this cause as District Judges and members of a special three-judge District Court, have a personal bias and prejudice against your affiant [Phillips] and in favor of the Baltimore & Ohio Railroad Company and its officers, directors and counsel."

V. Four Seasons Litigations

Mr. Phillips also has been actively involved in the litigations growing out of the collapse of the Four Seasons

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Nursing Home enterprise a few years ago. Several class actions and a bankruptcy proceeding growing out of this fiasco were referred to the Judicial Panel on Multidistrict Litigation and were transferred by it to the Western District of Oklahoma for consolidated pretrial proceedings before the Hon. Rozele Thomsen, former Chief Judge of the District of Maryland.

In 1972 Judge Thomsen approved a joint settlement between the class action plaintiffs, the trustee in the Chapter X proceedings, and the defendants. In Re Four Seasons Securities Laws Litigation, 63 F.R.D. 422, 427 (W.D. Okla. 1974). The Court's order made provision for the mailing to class members of notices and proofs of claim forms. The notice required those class members who wished to opt out to sign and return, not later than November 1, 1972, a written request for exclusion.

Mr. Phillips, who apparently had traded extensively in Four Seasons stock before the company's collapse, did not choose at this point to opt out of the class. Instead, he filed in the class actions a claim dated December 18, 1972 for \$93,422.49. On or about the same day he filed a similar claim in the Chapter X proceedings. (63 F.R.D. at 428, fn. 13)

On June 15, 1973 Mr. Phillips filed an action against Jack L. Clark, former board chairman of Four Seasons.

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Phillips v. Clark, S.D.N.Y. 73 Civ. 2690. On March 18, 1974 the Judicial Panel on Multidistrict Litigation transferred Phillips v. Clark, to the Western District of Oklahoma and assigned it to Judge Thomsen for consolidated pre-trial proceedings. In Re Four Seasons Securities Laws Litigation, 373 F.Supp. 975 (J.P.M.L. 1974).

On December 3, 1973 Mr. Phillips moved under Rule 60(b) of the Federal Rules of Civil Procedure for an order granting him relief from the final judgment which Judge Thomsen had signed on November 30, 1972 and entered on December 4, 1972. On March 25, 1974, he amended his motion to limit the relief sought to that part of the 1972 judgment dismissing claims against Clark, and to exclude from the judgment those claims asserted in Phillips v. Clark. Judge Thomsen denied the motion in In Re Four Seasons Securities Laws Litigation, 63 F.R.D. 422 (W.D.Okla. 1974), finding that "Phillips had not opted out; rather he had filed a claim, which included a broad release, and subsequently received and deposited the check for the dividend paid thereon." (63 F.R.D. at 424) Judge Thomsen concluded that the facts would make "it inequitable for Phillips to be excused for not having opted out. . . ." (63 F.R.D. at 434)

Mr. Phillips thereafter made several additional motions to avoid the effect of the judgment. He charged,

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among other things, that he had been denied due process in the settlement of the claims and that he had not been adequately represented by counsel for the class action plaintiffs. Judge Thomsen, in an opinion filed on October 2, 1974, reiterated his earlier findings that the notice given had met the requirements of due process. In Re Four Seasons Securities Laws Litigations, 64 F.R.D. at 325, 327 (W.D.Okla. 1974)

Mr. Phillips based his charge of inadequate representation on a contention that Ira Jay Sands, Esq., one of the counsel for the class representatives, had withheld information from him when Mr. Phillips had asked Mr. Sands for advice relative to accepting the settlement. The court rejected this contention as follows:

"Sands advised Phillips to accept the settlement, and there is nothing to show that this advice was not given in good faith, or that Sands did not answer honestly any question put to him by Phillips. Sands was under no duty to tell Phillips the multitudinous facts developed by discovery of all sorts when Phillips asked him for advice as to whether he should accept the settlement. Phillips misconceives the nature of litigation under Rule 23 and the role and duties of counsel for the class representatives. He was entitled to and received an honest answer to his question." (64 F.R.D. at 327)

On December 21, 1972, only three days after

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Mr. Phillips had mailed his claim in the class settlement, he filed a pro se complaint in the Southern District of New York against the American Stock Exchange where the stock of Four Seasons had been listed for trading. Phillips v. American Stock Exchange, S.D.N.Y. 72 Civ. 5361 (MEL). The action seeks to recover the losses which Mr. Phillips ostensibly suffered in trading in the Four Seasons stock and alleges that the Exchange had violated, to Mr. Phillips' detriment, various provisions of the Securities Exchange Act defining the duties of stock exchanges.

On March 27, 1975 Judge Lasker denied a motion by Mr. Phillips for summary judgment, and the action is pending. Phillips v. American Stock Exchange, [Current Binder] CCH Fed. Sec.L.Rep. ¶ 95,035 (S.D.N.Y. 1975) (MEL).

denying petition for admission, and the Court's order is denied. We agree. A substance with the Court is of our brother Kaufman's letter attached.

June 21, 1963

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Seven-

concurring

I too believe that the instant motion should be denied, but I would not want silence on my part to be construed as condonation. The movant, Randolph Phillips, seeks to intervene in a litigation terminated a year and a half ago and also to undo this Court's mandate in that closed litigation on the theory that our judgment was tainted by the fraud of the parties before the Court. He hurls thoroughly unsubstantiated charges at reputable counsel, contending that they fraudulently and corruptly entered into a settlement agreement in a companion case in the New York courts which, had this been known to our Court, would have necessitated our reaching a different conclusion from that recorded at 299 F. 2d 65, rehearing denied, 299 F. 2d 72 (1962). I am not so much concerned with Mr. Phillips' indignation at what he believes to be improper behavior on the part of counsel. What does concern me is his cavalier and outrageous use of the federal courts -- and indeed other forums -- for his unrestrained attacks upon the personal veracity and professional competence of counsel. He has entered, quite belatedly, a litigation which was bitterly contested in the first instance and which received the thorough and painstaking consideration of a panel of this Court, on original hearing and rehearing as well. He comes before this Court wearing the cloak of a pro se applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared

frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves in a long-closed litigation, moves which serve only to distract us from important judicial business. This is particularly true when it is noted that Mr. Phillips has not seen fit to raise his voice in the state-court hearing on the propriety of the settlement which is now before us, in this rather bizarre proceeding, to brand as fraudulently procured.

Perhaps we are correct in not imposing any penalty upon Mr. Phillips for his conduct, but I strongly feel that an express reprimand is warranted.

737-3070

139a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and
INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants.
----- x

72 Civ. 1544

MEMORANDUM

FRANKEL, D.J.

Plaintiff, a busy pro se litigant,
brought this action to recover \$94,950.00 plus interest
from October 1964. Service was made upon defendant
Alleghany Corporation on April 20, 1972. For reasons
that may or may not be compelling, but for no reason
substantially hurtful to plaintiff, Alleghany
did not retain its defense lawyers until May 9, 1972.
With the time to answer about to expire, defense
counsel sought diligently to reach plaintiff. Because
plaintiff's pro se facilities fall short of those in
law offices for this and other purposes, it was not
possible either to reach him or otherwise effect

arrangements for an extension. (The paper make this clear enough. Oral argument left no doubt about the difficulty of reaching or serving plaintiff.) In these circumstances, duly sworn and recited, counsel obtained from Judge Lasker, on May 10, an ex parte order extending to June 2, 1972, Alleghany's time to move or answer. Judge Lasker provided that service of this order would be sufficient if made on or before May 13, 1972. Attempting prompt personal service on May 11, but finding neither plaintiff nor any agent of his physically accessible, counsel served Judge Lasker's order by mail on that day.

As sometimes happens, that order was not filed instantly, with proof of service, in the office of our Clerk. But plaintiff was punctual, breathtakingly and to a fault.

On May 11, 1972, he made an affidavit for a default judgment. On the next day he obtained a default judgment for a total of \$137,696.82.

Alleghany's counsel learned of this on the afternoon of May 12, and immediately launched another series of efforts to reach plaintiff and remedy the absurdity. When he finally succeeded on May 15, it was not possible to effect an agreement for vacatur. The motion now before the court, to vacate the default and for other relief, was brought on by order to show cause signed May 15, 1972.

The ensuing proceedings, for what should have been routine correction of a situation that should never have existed in the first place, have been prolonged and exasperating beyond any due measure. And the main causes of the unpleasantnesses have been the tenacious bellicosity and abusiveness of the plaintiff. Referring repeatedly to his medical problems - describing himself, with unquestioned accuracy, as "an ill man of 61 1/2 years of age" - plaintiff has not stinted in heaping insult upon opposing counsel; he has filed volunrious and gratuitous attacks upon various state and

federal judges; he has festooned his papers with baseless and essentially irrelevant charges of fraud, including "fraud upon this court," malice, "hidden motives," and, to end with one of his gentler notes, the "obvious ignorance" of counsel for defendant. He has urged, preposterously, that counsel for defendant be "fined" and "censured."

There is a familiar class of pro se litigants from whom such behavior would be taken with serene and sympathetic understanding. But the present plaintiff is not such a one. He is, as a Judge of our Court of Appeals observed a while ago, "an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals." From Mr. Phillips, then, the course of invective and relentless imposition upon counsel and the court is both more grievous in its impact and less excusable than it might be from people lacking his competence. Whatever

visions "pro se" commonly inspires, we deal here with a citizen who can hold his own with the members of our bar. He should be held to standards of decency and propriety at least approximating those applicable to others.

Three things emerge from the unpleasantness:

- (1) The default should never have been entered, but it should certainly have been vacated voluntarily after plaintiff learned on May 12 of Judge Lasker's order.
- (2) The main cause of this sorrowful comedy is plaintiff's inaccessibility for service and consultation. An informal direction to correct this was made at oral argument and will be embodied in the order announced today.
- (3) Even if plaintiff was right to resist vacatur, his tendentious

mode of combat has imposed upon his adversary physical, emotional and technical legal burdens far beyond the reasonable necessities of the case.

For keenly understandable reasons, the movant seeks the exaction from plaintiff of costs and attorneys' fees. In this respect, however, the court will act only after further submissions. Counsel for the movant will serve and file, on or before July 3, 1972, an affidavit or affidavits detailing the claim for costs and attorneys' fees. At the same time a supporting memorandum of law should state and specifically document the legal ground or grounds for this claim. Plaintiff will have until July 17, 1972, for answering papers. The court will thereafter determine whether costs and attorneys' fees should be awarded, and, if so, the amount thereof.

At this time, the following rulings are made:

- (1) The motion to vacate the default is granted.
- (2) The movant's time to answer the complaint or make appropriate motions with respect to it is extended to June 27, 1972.
- (3) In accordance with the understanding reached at oral argument, service of papers in this case upon the plaintiff, where service more prompt than the mails is desired, may be made by leaving copies on the table in the lobby of plaintiff's apartment building at 30 East 72d Street, New York City, with plaintiff to make provision that entry into the lobby shall be feasible for such service during at least the hours from 9:00 a. m. to 6:00 p.m.

It is so ordered.

Dated: New York, New York
June 15, 1972

MARVIN E. FRANKEL

U.S.D.J.

(E)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

72 Civil 1544

Plaintiff,

-against-

ALLEGHANY CORPORATION et ano.,
Defendants.

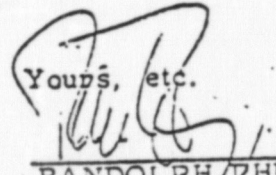
NOTICE OF MOTION
for reargument
under Rule 9(m) of
the General Rules
of this Court & for
other relief.

SIR:

PLEASE TAKE NOTICE that upon the Memorandum herein after appended, plaintiff herein will move for reargument of the matters set forth in a MEMORANDUM, by FRANKEL, D. J. filed in this Court on June 15, 1972 at 3:30 P. M., Opinion #38571, copy obtained by plaintiff this morning at 9:30 A. M., and of the Order therein made. The undersigned will so move this Court at the Civil Motion Part thereof to be held on the 27th day of June, 1972, at 10 o'clock in the forenoon of that or as soon thereafter as counsel can be heard, at Room 506 of the United States Courthouse, Foley Square, New York, N. Y.

Dated: June 16, 1972
New York, N. Y.

Yours, etc.


RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N. Y. 10021

TO: Marshall, Bratter, Greene, Allison
& Tucker
Attorneys for Defendant Alleghany
Corporation

430 Park Avenue
New York, N. Y. 10022

RANDOLPH PHILLIPS,

72 C. 1 1544

Plaintiff,

-against-

ALLEGHANY CORPORATION, et
ano.,

Defendant.

MEMORANDUM OF PLAINTIFF
RANDOLPH PHILLIPS in support
of MOTION FOR REARGUMENT
UNDER RULE 9(m) OF THE GENERAL
RULES OF THIS COURT OF THE
"Matters or controlling decisions" ...
"overlooked" by this Court in making
its MEMORANDUM & ORDER filed
herein June 15, 1972, OPINION
#38571.

POINT ONE: This Court failed to disclose and plaintiff Randolph Phillips did not know until today, after consulting Who's Who's Who in America for 1971-1972 that the Honorable Marvin E. Frankel, D.J. who made the aforesaid OPINION #38571, was from 1956 to 1962, a member of the firm of Proskauer Rose Goetz & Mendelsohn.

POINT TWO: Said Proskauer law firm was adversarial counsel to plaintiff Randolph Phillips for parties Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a co-partnership doing business as Gruss & Co., who by said law firm appeared in opposition to plaintiff Randolph Phillips in Alleghany Corporation, et al. v. Breswick & Co. and Randolph Phillips, 353 U.S. 151 (April 22, 1957) and the three-judge District Court proceedings relating thereto, and which only were terminated in January, 1958.

POINT THREE: Said Marvin E. Frankel, D.J. well knew that the subject matter of the motion decided before him in OPINION #38571 arose out of these cases

and cases related thereto, and nevertheless wrote said OPINION #38571 without disclosing therein any of the above facts.


POINT FOUR: The aforesaid acts of Marvin E. Frankel, D.J. were in violation of the Canons of Judicial Ethics of the American Bar Association, including Canons No. 4. Avoidance of Impropriety, No. 1. Relations of the Judiciary; No. 5, Essential Conduct; No. 26, Personal... Relations, second sentence; No. 34. A Summary of Judicial Obligations.

POINT FIVE: The aforesaid acts violate Amendment Five, of the Constitution of the United States, depriving plaintiff Randolph Phillips of "due process of law."

POINT SIX: The facts of said Judge's prior relationships imposed upon him a judicial duty to disclose them in any OPINION written by him, a duty which he violated. "Silence, when there is a duty to speak, can itself be a fraud." S. E. C. v. Texas Gulf Sulphur Co., 401 F.2d 833, slip opinion at 3641 (2d Cir. 1968, Friendly, C.J)

POINT SEVEN: Opinion #38571 cites no Rule of the Federal Rules of Civil Procedure nor of the General Rules of this Court nor any other authority nor any case citation and thus makes it impossible for the United States Court of Appeals for the Second Circuit to review the basis in law for the OPINION herein. Such absence of cited authority is without precedent in plaintiff's more than 27 years experience in the federal and state courts, and constitutes a violation of Amendment Five to the Constitution of the United States by denying plaintiff Randolph Phillips "due process of law".

WHEREFORE, this Motion for Reargument should be granted and the OPINION & ORDER herein vacated forthwith, and the motions of defendant Alleghany Corporation which are the subject matter of said OPINION & ORDER denied forthwith.


 RANDOLPH PHILLIPS
 Attorney Pro Se.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and
INVESTORS DIVERSIFIED
SERVICES, INC.,

Defendants.

----- x

FRANZEL, D.J.

Having joined the roster of judges and others charged with fraud by this plaintiff, I have duly considered the assertion that I should heretofore have recused myself from this case or should do so now. I conclude that the performance of my duties required, and continue to require, handling of this matter in the normal course of the court's business.

Defendant's papers sufficiently refute, I think, the atrocious conclusions plaintiff would draw from my involvement 15 years or so ago as an associate in the law firm of which I later became a member.



38629

72 Civ. 1544

MEMORANDUM

If facts like these could be disqualifying - or could be deemed by any rational person to create appearances of impropriety - the judges of this court would spend much of their time reviewing their work lives and handing over to each other such routine chores as the motion in the instant case.*

The motion for reargument is denied. It is so ordered.

Dated: New York, New York:
July 3, 1972

William E. Frankel
U.S.D.J.

* It is of passing, if incidental, interest to note that plaintiff's research efforts into my biography were not triggered in the course of Valenti v. Rockefeller, 292 F. Supp. 631 (1966), affirmed, 393 U.S. 405 (1969), where my (erroneous) judgment was that his side should prevail.

UNITED STATES COURT OF
FOR THE SECOND CIRCUIT

ALLEGHANY CORPORATION,

Defendant-Appellant,

v.

RANDOLPH PHILLIPS,

Plaintiff-Appellee.

72 Civ. 1544 151a
C/A Ref. No. T-1310

Docket # _____

REQUEST FOR RECON-
SIDERATION OF ORDER
ENTERED HEREIN ON
AUGUST 9, 1972 BY
TIMBERS, C. J., pursuant
to second sentence of
RULE 27(b) of the Federal
Rules of Appellate Procedure

NOW COMES RANDOLPH PHILLIPS, plaintiff-appellee
herein and respectfully requests this Honorable Court
for Reconsideration of its Order entered herein on August 9, 1972 by
Timbers, C. J., pursuant to Plaintiff-Appellee's rights under Rule 27(b)
of the Federal Rules of Appellate Procedure, on the following grounds:

1. The Order of Judge Timbers was filed in this Court on
August 9, 1972, based solely on Defendant-Appellant Alleghany
Corporation's Memorandum of Law, served August 7, 1972.

2. Plaintiff-Appellee's REPLY MEMORANDUM & REPLY
AFFIDAVIT were served and filed in this Court on August 10, 1972.
It is obvious from these facts that this Court did not and could
not have given consideration to plaintiff's REPLY MEMORANDUM
& REPLY AFFIDAVIT, nor did it give plaintiff any opportunity to
to file said papers & instead rushed out its decision apparently
under the mistaken belief the issues & facts & law had been
correctly stated by defendant. To decide the pending motion
adversely to plaintiff under such circumstances is to deprive him
of due process of law.

3. The moving papers of plaintiff in this Court have appended thereto as EXHIBIT F a copy of a 2-page advertisement in The New York Times of May 31, 1972 headed "A RESOLUTION TO IMPEACH RICHARD M. NIXON AS PRESIDENT OF THE UNITED STATES" and show that plaintiff Randolph Phillips is Chairman of THE NATIONAL COMMITTEE FOR IMPEACHMENT the sponsor of the advertisement which reprints a House Resolution of Impeachment introduced by 2 members of the Committee on the Judiciary of the House of Representatives and 6 other members of the House of Representatives.

4. Judge William H. Timbers of this United States Court of Appeals for the Second Circuit was appointed to this Court by Richard M. Nixon as President of the United States, plaintiff's adversary in the Impeachment proceedings. He clearly was disqualified to act herein Adams v. U.S.A., 302 F.2d 307 and cases cited.

5. In these circumstances, it was judicially inappropriate and exhibited a singular lack of good taste for Judge Timbers to decide the motion in question and to participate in this case, especially when there are numerous Judges of this Circuit who were not appointed by President Nixon. Such acts tend to bring the reputation of this Court into disrepute for political partisanship and distract from its excellent and well-earned reputation for nonpartisanship.

6. The moving papers of plaintiff also showed that he, in a conversation with Senator McGovern after the latter's nomination and acceptance of the nomination by the Democratic Party as its candidate for President of the United States had pledged \$125,000 of the sum herein at issue, either by assignment or as a loan, to the Democratic Finance Committee to pay for 15 minutes of prime television time for Mr. McGovern. Plaintiff-appellee, as a matter of good taste, asked

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that the part of the moving affidavit reciting these facts be sealed but cited them as a reason for urgency for granting the relief sought by him. Judge Timbers has now denied the request that this part of the affidavit be sealed. No reason for this action has been given by him. Thus the entire action of Judge Timbers smacks of political partisanship as distinct from judicial objectivity, especially since it is well known that Judge Timbers is a Republican and prior to his entry into public service as General Counsel for the Securities and Exchange Commission was appointed thereto by a Republican Administration. It is also well known that Senator McGovern suffers a shortage of campaign funds which are needed to place his case for election as President fairly before the American electorate and that the large corporate interests of the Nation are supporting ^{the Re-Election of President Nixon} with a \$10,000,000 fund, sources undisclosed by the Republican National Committee under John N. Mitchell, then Attorney General of the United States. Prior to his entry into public service Mr. Timbers was associated with the law firm of Davis Polk & Wardwell, attorneys for the Morgan-Guaranty Trust Company, J. P. Morgan & Co., Inc. and other of the largest corporate interests of the Nation.

7. Mr. Timbers was a delegate from Connecticut to the Republican National Convention of 1956 that nominated Richard M. Nixon as its Vice-Presidential nominee, and also was an adversary of plaintiff.

8. The Canons of Judicial Ethics, which are in issue in this case with respect to the orders below of Marvin Frankel, D.J., a former adversary of plaintiff in cases affecting \$50,000,000 of Alleghany Corporation securities, and who decided adversely to plaintiff the issues below accompanied by a ferocious extrajudicial personal attack, require in

matters of personal conduct by judges, as does the Judicial Code of the United States, the following high standards of conduct:

(Title 28, U. S. C. A.)

§ 453. Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

CANONS OF JUDICIAL ETHICS *
With Amendments to January 1, 1968

Ancient Precedents.

"And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great: ye shall not be afraid of the face of man; for the judgment is God's: and the cause that is too hard for you, bring it unto me, and I will hear it."—
Deuteronomy, I, 16-17.

Preamble.

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful

* These Canons, to and including Canon 34, were adopted by the American Bar Association at its Forty-Seventh Annual Meeting, at Philadelphia, Pennsylvania, on July 9, 1924. The Committee of the Association which prepared the Canons was appointed in 1922, and composed of the following: William H. Taft, District of Columbia, Chairman; Leslie C. Cornish, Maine; Robert von Mohr, New York; Charles A. Boston, New York; and Garret W. McEnerny, California. George Sutherland, of Utah, originally a member of the Committee, retired and was succeeded by Mr. McEnerny. In 1923, Frank M. Angellotti, of California, took the place of Mr. McEnerny.

Canons 23 and 35 were amended at the Fifty-Sixth Annual Meeting, Grand Rapids, Michigan, August 22-September 1, 1933. Canon 23 was further amended at the Seventy-Third Annual Meeting, Washington, D. C., September 29, 1936. Canons 33 and 35 were adopted at the Sixtieth Annual Meeting, at Kansas City, Missouri, September 30, 1937. Canon 33 was amended at San Francisco, Calif., Sept. 1932.

20. Personal Investments and Relations.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

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33. Social Relations.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

CANONS OF PROFESSIONAL ETHICS *

With Amendments to January 1, 1968

Preamble.

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

*These canons, to and including Canon 22 and the recommended oath, were adopted by the American Bar Association at its Thirty-First Annual Meeting at Seattle, Washington, on August 27, 1921. The supplemental canons, 23-43, were adopted August 24, 1921. Canon 24 was amended at the Fifty-First Annual Meeting at Seattle, Washington, on July 24, 1925. Canons 11, 12, 13, 15 and 43 were amended, and Canon 16 was adopted, at Grand Rapids, Michigan, on August 31, 1927. Canon 16 was amended on February 21, 1928, at the midwinter meeting in Chicago, Illinois. Canons 7, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 43 were amended, and Canon 47 was adopted, at Kansas City, Missouri, on September 23, 1927. Canon 27 was further amended at Philadelphia, Pennsylvania, September 11, 1940. Detroit, Michigan, August 27, 1942. Chicago, Illinois, August 23, 1943. New York, N. Y., September 12, 1951; and Canon 43 was further amended at Detroit, Michigan, August 27, 1942.

Black's Law Dictionary 4th Ed. Rev.

9. Plaintiff-Appellee Randolph Phillips at no time was informed, prior to his receipt on August 12, 1972 of Judge Timbers' decision herein, that Judge Timbers would decide the motion herein.

10. The impropriety of that decision is further highlighted by the fact it is unaccompanied by any opinion, lacks any citation to support its extraordinary rulings, and fails to find why the cited authorities of plaintiff in support of his motion for execution of his Default Judgment

in the amount of \$137,692.82 are not applicable. In fact, one of the 157a
extraordinary facets of Judge Frankel's ferocious attack upon myself
below and his order vacating this Default Judgment is the absence of
any citation to the record in support of any of his found facts or
conclusions of law and the total absence of cited authority judicial or
otherwise for his conclusion and results. This plainly is not law, but
politics and worse, a vendetta arising out of my successful battle with
associates to restore control of the \$8 billion system of mutual fund
companies controlled by Murchisons Brothers ^{And Alleghany Corporation} (during which control
Richard M. Nixon as a private citizen was a member of the Boards
of Directors of the underlying fund companies until I suggested he
retire therefrom, which he did by not standing for re-election in May,
1968) ^{AND} with which was intermingled the legal contest to enjoin the issuance
of \$50,000,000 of illegally-issued Alleghany securities and in which
Judge Frankel was my adversary among others and ^{why as a circuit judge} now seeks to vacate
the Default Judgement in my favor for \$137,692.82 arising from my
successful defense of a sham "fraud" suit, stimulated against me by
former associates of Henry J. Friendly, now Chief Judge of this
Circuit, and whose defeat by myself when he was my adversary in
private life was repaid by him as a Judge of this Court in obtaining
participation in every panel deciding an Alleghany-IDS case, the latter
being a former client of his, and then deciding those cases (no less
than 4 in number) adversely to myself or former associates and in
favor of his former clients. All of his prior relationships being un-
disclosed to his fellow panel members and in the Opinions in question.
See THE NEW YORK TIMES article disclosing his conduct therein
printed in Scanlon's Magazine of May 1970, Exhibit E to plaintiff's
moving affidavit herein.

7

11. Now Judge Timbers, a Nixon appointee, has joined the list of judges who have no ethical standard that prevents their participation in cases, where prior relationships (here Judge Timbers' appointment by President Nixon and his deciding a case one of whose exhibits discloses my association with the proposed Impeachment of President Nixon) cause them not a flicker of their judicial eyelash but lead them into judicial denial of all relief asked by plaintiff and without cited authority in the record or in the law. 158a

12. Thus there exists in the Second Circuit 3 judges (Chief Judge Friendly, Circuit Judge Timbers & District Judge Frankel) who dishonor the reputation of the Circuit, with its overwhelming majority of fine & impartial and qualified judges, by ad hominem rulings arising out of extrajudicial motivations, either political or personal in nature, and which if not repelled by the residual decency that must nevertheless exist in them, as in all human beings, will not only serve further to lower the reputation of the Nation's courts for disinterested administration of JUSTICE, EQUAL UNDER LAW TO ALL PERSONS, but will simply provide additional proof that the Courts are mere personal tools of special corporate interests, politically-oriented & malicious in pursuing the adversaries of such courts and interests.

WHEREFORE, this Court is respectfully requested, pursuant to Rule 27(b) of the second sentence of the Federal Rules of Appellate Procedure, for Reconsideration of its ORDER entered and filed herein on the 9th day of August, 1972, and upon such RECONSIDERATION to grant plaintiff-Appellee's motion herein filed July 27, 1972.

Dated: New York, N. Y.
August 11, 1972.

RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N. Y. 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own
capacity as directors of Alleghany
Corporation, and as attorney for and
guardians of the property of Allan
P. Kirby, Sr., JOHN J. BURNS, JR.,
RALPH K. GOTTSALL, RICHARD R. HOUGH,
WILLIAM G. RABE, CLIFFORD H. RAMSDELL,
and CARLOS J. ROUTH as directors of
ALLEGHANY CORPORATION, and ALLEGHANY
CORPORATION,

Defendants.

74 Civ. 5740
(RJW)

AFFIDAVIT

----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JARED C. HORTON, being duly sworn, deposes and says:

1. I am Vice President, Secretary and Treasurer of Alleghany Corporation ("Alleghany"), and have held these positions continuously since 1967, 1963, and 1956, respectively. This affidavit is submitted in support of the motions by defendants Alleghany, John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr., and John J. Burns, Jr. for judgment on the pleadings. It is designed to set forth matters in support of the defendants' contentions that this Court lacks subject-matter jurisdiction over this action, that the amended complaint is barred, in whole or in part, by laches and the relevant statutes of limitations, and for failure to state a claim.

2. I have read the complaint and amended complaint filed in this action, a copy of which is submitted herewith as Exhibit 1, and am familiar with the allegations contained therein.

3. At the request of counsel for defendants, I have reviewed the relevant files and records of Alleghany with respect to the history of Alleghany's regulation by the Interstate Commerce Commission ("ICC").

4. I have also reviewed the above-mentioned files and records to ascertain when and to what extent plaintiff Randolph Phillips, specifically, and shareholders of Alleghany and the public generally had knowledge of the transactions challenged in the amended complaint.

5. I have set forth herein the results of my review as well as other matters that counsel advise me are relevant to defendants' motions. Unless otherwise indicated, the statements made herein are based on my knowledge or on the cited files and records of Alleghany.

Alleghany's Regulation by the ICC

6. Alleghany was incorporated in 1929 under the laws of the State of Maryland and has been primarily engaged since that time in holding controlling interests in some companies and substantial interests in other companies, including transportation companies subject to the Interstate Commerce Act.

7. Throughout its history Alleghany has followed a policy of reinvesting a substantial portion of its earnings in

order to provide for the growth of the corporation and its continuing program of acquisitions.

8. By order dated June 5, 1945, a copy of which is submitted herewith as Exhibit 2, the ICC approved and authorized, subject to certain conditions, Alleghany's control of the Chesapeake and Ohio Railway Company ("C&O") and subjected Alleghany to regulation under the Interstate Commerce Act "unless and until otherwise ordered. . . ."

9. Since June 5, 1945, up to and including the present date, Alleghany has continuously been subject to ICC jurisdiction and has continuously complied with ICC requirements concerning, among other things, reporting and record-keeping, submission of annual reports, maintenance of depreciation schedules, and the issuance of securities.

10. Pursuant to an order of the ICC's Division 4 on March 2, 1955 and an order of the full ICC on May 24, 1955 in the Louisville and Jeffersonville Bridge and R.R. Merger, Finance Docket No. 18656 (the "Louisville Merger proceeding", Alleghany was, on the basis of the control it then held over the New York Central Railroad Company ("Central"), subjected to ICC regulation as a non-carrier in control of a carrier "[u]nless and until otherwise ordered." Copies of the above orders are submitted herewith as Exhibit 3.

11. At the time Alleghany also owned securities of the Missouri Pacific Railroad Company ("Missouri Pacific") which was then a bankrupt involved in reorganization proceedings. Division 4, subsequently affirmed by the full Commission,

conditioned its approval of the transactions involved in the Louisville Merger proceeding upon, among other things, Alleghany's deposit with an independent voting trustee, nominated by Alleghany and approved by the Commission, of any voting securities of the corporation succeeding the Missouri Pacific. When it thereafter appeared to the Commission that Alleghany had obtained such securities, the Commission entered a report and order on May 14, 1957 in Finance Docket No. 18656 requiring that those securities be placed in trust. On June 11, 1957, Alleghany executed a Voting Trust Agreement with the former Empire Trust Company of New York which provided, among other things, that Alleghany "agrees to assign, transfer and deliver to [the Empire Trust Company] all voting stocks of the carriers subject to the Interstate Commerce Act (other than stocks of the New York Central Railroad and its affiliated carriers) which it may acquire." By report and second supplemental order of October 2, 1957, the ICC approved and authorized the terms and provisions of the Voting Trust Agreement subject to certain modifications. The Agreement between Alleghany and the Bank of New York, as successor to the former Empire Trust Company, was renewed on June 11, 1967. By report and third supplemental order, dated August 11, 1967, the Commission approved and authorized the designation of the former Franklin National Bank as a successor trustee "with all the rights, powers and duties prescribed in the . . . voting trust agreement dated June 11, 1957 as approved by the Commission in its second supplemental report and order herein, dated October 2, 1957. . . ." Copies of the ICC orders of May 14, 1957, October 2, 1957, and August 11, 1967 are attached hereto as Exhibit 4. A copy of the Trust Agreement, as well as its subsequent modifications, is included in Exhibit 11 herewith.

12. In 1955 the Court found in Breswick & Co. v. United States, 138 F.Supp. 123 (S.D.N.Y.), that Alleghany was subject to the Investment Company Act. On December 9, 1955, while Alleghany was pursuing an ultimately successful appeal of this decision to the Supreme Court, which reversed at 353 U.S. 151 (1957), Alleghany filed with the SEC a notification of registration as an investment company. Alleghany expressly reserved its right to continue its defense in the Breswick litigation, where it contended, among other things, that it had been at all times since June 5, 1945 subject to regulation under the Interstate Commerce Act and, thereby was not subject to the Investment Company Act. On May 26, 1959, after the Breswick case had twice reached the Supreme Court and the complaint had been dismissed on the merits by this Court, Alleghany withdrew its notification of registration under the Investment Company Act.

13. In March 1966 Alleghany was the largest single shareholder of Central, owning 984,100 shares of common stock (or nearly 15 per cent of such shares outstanding). Alleghany determined to reduce substantially its holdings in Central, in part because, while Alleghany controlled Central, it would not control or have the power to control the corporate activities of the corporation which would emerge from the merger, then contemplated, of the Central and the Pennsylvania Railroad Company.

14. On March 28, 1966 Alleghany made an offer to its shareholders to exchange its Central stock for securities of Alleghany owned by them. The tender was accepted by many shareholders, and, as a consequence of the resulting exchange, Alleghany's ownership of Central was reduced from 14.2 per cent

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to 2.2 per cent of the Central shares outstanding. Until the date of the merger of the Central and the Pennsylvania Railroad, however, Alleghany continued in control of Central, since the Central shareholders continued to elect directors nominated by Alleghany.

15. The late Allan P. Kirby, Sr., then Alleghany's largest shareholder, did not tender any of his shares in the exchange transaction described in the preceding paragraph. Since the exchange reduced the number of shares of Alleghany stock outstanding, Mr. Kirby's share of the outstanding common stock of Alleghany increased from 40.45 per cent to more than 50 per cent.

16. On February 1, 1968 the Penn Central merger was consummated. Alleghany received 196,195 shares of the common stock of Penn Central (or 0.81 per cent of the shares outstanding as of March 1, 1969).

17. On April 10, 1968 Alleghany filed a notification of registration with the Sec as an investment company under the Investment Company Act, 15 U.S.C. §§ 80a-1 to 80a-52. The notification, a copy of which is submitted herewith as Exhibit 5, stated that Alleghany was not an "investment company" within the meaning of that act and declared that the filing was made "solely for the purpose of eliminating such uncertainty, if any, as may exist as to Alleghany Corporation's status as a company subject to regulation under the Interstate Commerce Act and constitutes neither an admission that Alleghany Corporation is an investment company within the meaning of the Investment Company Act of 1940 nor a waiver by Alleghany Corporation of any rights or status."

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18. After its distribution of the major portion of its shares in Central in 1966, Alleghany determined to acquire the Jones Motor Company, Inc. ("Jones"), a common carrier of general and special commodities by motor vehicle operating in nineteen states in the East and Midwest. Jones was an attractive acquisition because it was a sizable carrier serving a wide geographic area; the purchase price represented a reasonable multiple of earnings and a reasonably low premium over book value (which in the case of a transportation company does not adequately reflect intangible assets, including the right to operate as an ICC-certificated carrier). The acquisition of Jones also provided a means -- though there were others -- for Alleghany to eliminate any potential liability to pay personal holding company taxes by reason of Allan P. Kirby, Sr.'s increased ownership interest in Alleghany resulting from the Central exchange offer. The acquisition of the operating rights of a motor carrier was also important to Alleghany as a means of clarifying its continued regulation by the ICC.

19. Regulation of Alleghany by the ICC under the Interstate Commerce Act, rather than by the SEC under the Investment Company Act, also was preferred by Alleghany because the former afforded Alleghany much greater flexibility in its operations. For example, an ICC-regulated carrier is free to arrange its debt and equity as it chooses, subject, of course, to required ICC approval of securities issuances. The Investment Company Act, on the other hand, stringently restricts the capital structure of companies governed by it. Analogously, the Investment Company Act imposes restrictions and limitations on the issuance and sale of securities by, the repurchase of its own securities by, and use of its securities for acquisitions

by a Company it regulates, which are not present in the ICC's regulatory scheme. Further, under ICC regulation, Alleghany need not formally declare or conform to any specific non-carrier investment policies. Conversely, the Investment Company Act requires a specific declaration of investment and other fundamental policies in the initial registration statement and prohibits deviation from the declared policies without stockholder approval or the filing of a new statement of policies. Alleghany's 1969 proxy statement, a copy of which is submitted herewith as Exhibit 6, enumerates on pages 6 and 7 a number of additional managerial restrictions which are imposed by the Investment Company Act, but not by the Interstate Commerce Act.

20. Alleghany made a public tender for shares of Jones, which, after extension, expired on October 10, 1968. Alleghany acquired as of that date 603,948 shares of Jones Common Stock (or almost 98 per cent of such shares outstanding) and all of the 3,356 outstanding shares of Jones' 5% Cumulative Preferred Stock. The terms and conditions of Alleghany's tender offer for the Jones stock were set forth in a Letter Agreement between Alleghany, Jones and certain Jones shareholders. Upon expiration of the tender offer in October, 1968, the purchase of the Jones stock was complete and the purchase price was not, as plaintiff's amended complaint suggests, subject to renegotiation. All Jones shares purchased by Alleghany were deposited with the Marine Midland-Grace Trust Company of New York ("Marine Midland"), as an independent voting trustee, pursuant to the terms of a Voting Trust Agreement dated September 26, 1968, between Alleghany and Marine Midland. I am informed that

Alleghany executed this Voting Trust Agreement with Marine Midland and deposited its Jones stock in accordance therewith, and did not make use of its existing voting trust with the Franklin National Bank (described in paragraph 11, supra), because the ICC staff suggested that Alleghany's deposit of the stock of a second carrier with Franklin might be deemed to give Franklin "control" of two or more carriers in violation of section 5(4) of the Interstate Commerce Act.

21. Alleghany's Notice of Annual Meeting of Shareholders (on April 25, 1969) and the related proxy statement, both dated April 1, 1969, set forth proposals to authorize Alleghany to cease to be an investment company for purposes of the Investment Company Act and to permit it to become a motor carrier. The Notice of Annual Meeting and proxy statement are submitted herewith as Exhibit 6. At the annual meeting, duly held on April 25, 1969, both proposals were adopted by a vote in excess of 99.8 per cent of the shares voting. On that occasion also a slate of directors nominated by management was elected without opposition.

22. Beginning in October, 1968 Alleghany initiated a series of ICC proceedings seeking approval and authorization for, among other things, its acquisition of control of Jones. Because Alleghany sought to transfer to itself the operating rights of Jones and thereby become subject to ICC regulation as a motor carrier, Alleghany filed a petition in the Louisville Merger case, Finance Docket No. 18656, to vacate the outstanding

ICC orders of March 2 and May 24, 1955 which, by virtue of Alleghany's control of Central, had subjected Alleghany to regulation under the Interstate Commerce Act as a non-carrier in control of a carrier. By order dated August 14, 1969, a copy of which is submitted herewith as Exhibit 7, the ICC ordered consolidation of the various petitions relating to the Jones transaction, including Alleghany's application in the Louisville Merger docket to vacate the March 2 and May 24, 1955 ICC orders. Submitted herewith as Exhibit 8 is a copy of the petition to vacate (8(a)), as well as excerpts from subsequent filings by Alleghany in the consolidated Jones Motor proceeding (8(b) and (c)), demonstrating that the ICC was fully informed of the price paid for Jones, the personal holding company tax and regulatory concerns in the Jones acquisition, and the contents of the April 1, 1969 proxy statement.

23. By report and order dated January 27, 1970 in the consolidated Jones proceeding, the ICC approved, subject to certain conditions, Alleghany's acquisition of control of Jones and the transfer of the Jones operating rights to Alleghany, thereby subjecting Alleghany to regulation as a motor carrier under Part II of the Interstate Commerce Act. A copy of the ICC order is submitted herewith as Exhibit 9. The ICC's full report and order also are published in the Commissions' official reports at 109 M.C.C. 333 (1970).

24. In order to satisfy the conditions imposed by the ICC when authorizing the Jones transaction, the interlocking directorates between Alleghany, Penn Central and their subsidiaries and affiliates were terminated by March 25, 1970.

On April 30, 1970, after satisfaction of all the conditions imposed by the ICC, the Jones merger was consummated and became effective.

25. By order dated August 21, 1970, a copy of which is submitted herewith as Exhibit 10, the SEC ordered that Alleghany's registration under the Investment Company Act "shall forthwith cease to be in effect."

Specific Notices to Plaintiff of
Transactions Challenged in the Complaint

26. Plaintiff Randolph Phillips, who had intervened in 1955 in the Louisville Merger proceeding, Finance Docket No. 18656, received, as an intervening party, a copy of Alleghany's petition of October, 1968 to vacate the ICC's March 2 and May 24, 1955 orders, which petition was made part of the consolidated Jones Motor proceeding, and certain "supplemental materials." A copy of this petition, including its certification of service by certified mail on October 8, 1968 on, among others: "Randolph Phillips, 128 E. 70th Street, New York, New York," is included in Exhibit 8. A copy of the supplemental materials with the certification of service by certified mail on October 21, 1968, on, among others: "Randolph Phillips, 128 E. 70th Street, New York, New York" is submitted herewith as Exhibit 11.

27. The petition to vacate in paragraph 10(b) on page 5, (see Exhibit 8 hereof), describes in full Alleghany's purchase of Jones stock pursuant to the tender offer and also indicates Alleghany's intention to file an application with the ICC for transfer of the Jones operating rights to Alleghany.

28. Both the petition and the supplemental materials included a copy of the September 26, 1968 Voting Trust Agreement between Alleghany and Marine Midland pursuant to which Alleghany placed its Jones stock in trust.

29. The supplemental materials also included the June 11, 1957 Voting Trust Agreement between Alleghany and the former Empire Trust Company, together with amendments and modifications thereto, as well as the September 27, 1968 acquisition agreement between Alleghany and Jones, and the proposed agreement and plan of merger between Alleghany and Jones.

30. As noted above, Alleghany's petition in the Louisville Merger docket was consolidated by the ICC for hearing with the other applications relating to the Jones transaction. On information and belief, the ICC, in compliance with Rule 55(a) of that Commission's General Rules of Practice (49 C.F.R. 1100.55(a)), served notice of the time and place of the consolidated Jones Motor proceeding upon plaintiff by reason of his prior intervention in the Louisville Merger proceeding.

Notices to Shareholders of Transactions
Challenged in the Complaint

31. Alleghany's 1968 Annual Report, dated (and distributed on or about)* March 25, 1969, stated that Alleghany had acquired 98.2 per cent of the common stock and all of the preferred stock of Jones through a tender offer and subsequent market purchases (p. 2). In addition, the Annual Report explained:

* The shareholder materials described in paragraphs 31 to 35 of this affidavit were distributed to shareholders on or about their indicated publication dates.

"Alleghany has petitioned the ICC to vacate the existing orders subjecting the Company to regulation under certain sections of the Interstate Commerce Act, and has also applied to the ICC for authority to transfer Jones' operating certificates to Alleghany. If granted, your Corporation will then apply to the SEC for exemption from regulation as an investment company. Favorable action upon these applications would result in Alleghany being regulated as a motor carrier by the ICC." (p. 3)

A copy of the report is submitted herewith as Exhibit 12.

32. As noted in paragraph 21, supra, Alleghany's 1969 Notice of Annual Meeting and proxy statement, each dated April 1, 1969, and submitted herewith as Exhibit 6, included a proposal for shareholder action to authorize Alleghany's deregistration under the Investment Company Act of 1940 and another proposal to authorize Alleghany to engage in business as a motor carrier. The proxy statement explained the tender offer, Alleghany's acquisition of the Jones stock, deposit of the stock in trust and the proposed merger.

33. The 1969 Semi-Annual Report of Alleghany (as of June 30, 1969), dated August 25, 1969, at page 3, again described Alleghany's acquisition of Jones stock, its pending applications to the ICC for transfer of the Jones operating rights, and the proposed application to the SEC for deregistration. A copy of the report is submitted herewith as Exhibit 13.

34. Alleghany's 1969 Annual Report, dated March 18, 1970, at page 2, described the January 27, 1970 ICC order approving the Jones acquisition as in the public interest and Alleghany's proposed application to the SEC. It explained the

Jones acquisition and included complete financial statements, notes and the accountants' report on Jones. A copy of the report is submitted herewith as Exhibit 14.

35. Alleghany's 1970 Semi-Annual Report (as of June 30, 1970), dated August 28, 1970, at page 3, and its 1970 Annual Report, dated March 18, 1971, at page 4, described Alleghany's assumption of the operations and control of Jones, the January 27, 1970 ICC order authorizing it, and the August 21, 1970 SEC order deregistering Alleghany under the 1940 Act. Copies of the 1970 Semi-Annual Report and the 1970 Annual Report are submitted herewith as Exhibit 15 and Exhibit 16, respectively.

36. The Annual Reports and Notice of Annual Meeting enumerated in paragraphs 31, 32, 34, and 35 hereof were properly delivered by Alleghany to its transfer agent, Chemical Bank of New York, for distribution to all shareholders.

37. On information and belief, Chemical Bank distributed the Annual Reports and proxy materials to all shareholders of record as of the respective distribution dates. Copies of the affidavits attesting to the proper distribution of these documents, which Chemical Bank supplied to Alleghany shortly after each distribution, are submitted herewith as Exhibit 17.

38. On information and belief, the shareholders of record who are not also the beneficial owners (i.e., brokerage houses, banks maintaining custodial accounts, etc.), in turn distributed the documents referred to in paragraph 37 to all beneficial owners of Alleghany stock (i.e., the clients of the

brokerage houses, etc.) on or shortly after the respective distribution dates.

Notices to the General Public of the
Transactions Attacked in the Complaint

39. On September 5, 1968, Alleghany issued "for immediate release" a press announcement of its tender offer for Jones. A copy of this announcement is submitted herewith as Exhibit 18.

40. On September 6, 1968, an article describing the Jones tender offer was published in the Wall Street Journal under a headline reading "Alleghany Corp. Plans To Buy Jones Motor For About \$13.3 Million." A copy of this article is submitted herewith as Exhibit 19.

41. In the course of the Jones proceeding, on April 9, 1969, Alleghany filed an application with the ICC seeking authorization for, among other things, acquisition of control of Jones. This application was made public by a notice of filing published by the ICC in the Federal Register on April 16, 1969 (34 F.R. 6560). This notice invited public comment. A copy of this notice is submitted herewith as Exhibit 20.

42. Alleghany's July 16, 1970 application for an SEC declaration that the company had ceased to be an investment company was made public by the SEC in an Investment Company Act Release (No. 6117) and as an item in the Federal Register of July 22, 1970 (35 F.R. 11725). A copy of the Federal Register publication of this notice, which invited public comment, is submitted herewith as Exhibit 21.

43. The January 27, 1970 ICC report and order in the consolidated Jones Motor proceeding was published by the ICC in its official reporter at 109 M.C.C. 333.

Other Matters

44. Alleghany's shareholder records indicate that plaintiff is not an owner of record of any shares of Alleghany common stock and was not such a record owner at any time mentioned in the amended complaint. Alleghany has nothing in its files that indicates that plaintiff has (or had at any such time) a beneficial interest in shares owned of record by someone else.

45. According to the "Monthly and Yearly Record of Stocks on the New York Stock Exchange", compiled by Bank & Quotation Record, 7,905,400 shares of Alleghany stock were traded on the Exchange between January 1, 1969 and December 31, 1974. Copies of the tables relied upon for this statement are submitted herewith and marked as Exhibit 22. These statistics suggest that a great many of Alleghany's present shareholders were not shareholders at the time of the events mentioned in the amended complaint and that many of the shareholders during that period are not shareholders now-

Alleghany's Changes of Position and the Harm of Attempting to Reverse Them

46. To require Alleghany to divest itself of Jones at this time, as is sought under paragraph 4 of plaintiff's prayer for relief, would cause irreparable injury to the corporation. Since April 30, 1970, when Alleghany was permitted to assume control of Jones, Jones has been an integral part of the

corporation's total business. As outlined in the 1974 Annual Report of Alleghany (a copy of which is submitted herewith as Exhibit 23), the Jones Motor Division is now one of the three principal businesses in which Alleghany is engaged, and it accounts for over fifteen per cent of Alleghany's total assets. The activities involved in the operations of Jones include, inter alia:

"An extensive program of replacement and improvement of its fleet of motor vehicles and trailers, began in 1973, has now been virtually completed.

"Five new terminals were opened in 1974, helping expand the market areas served by Jones. Older terminals have been extensively refurbished.

"Together with other motor carriers, Jones succeeded in petitioning the Interstate Commerce Commission to eliminate 'gateway' requirements, under which vehicles were frequently required to follow circuitous routes in order to pass through specified 'gateways.' The abolition of these requirements should improve both service and efficiency.

"Jones sales force has been improved, re-organized and substantially enlarged.

"Its safety program has made substantial headway, and a new damage prevention program has been instituted and staffed." (p. 4)

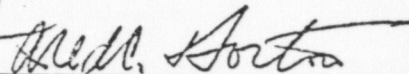
47. To require Alleghany to register as an investment company under the 1940 Act at this time, as is sought under paragraph 6 of plaintiff's prayer for relief, also would have a substantial adverse impact upon the corporation. As outlined in the 1974 Annual Report (Exhibit 23), Alleghany, in the five-year period since its deregistration under the Investment Company Act in 1970, has changed the nature of its business from one in which it was primarily engaged in owning marketable securities to one in which it is basically an operating company. This change was completed in 1974, by the sale of Alleghany's minority

voting interests in the Missouri Pacific Railroad and the USM Corporation (the former United Shoe Machinery Corporation) and by the acquisition of MSL Industries, Inc. ("MSL"), a diversified steel products manufacturing and distributing company, through a tender offer in which Alleghany acquired approximately 95 per cent of MSL's stock. By virtue of these transactions, the present asset ratio between Alleghany's operating assets and its marketable investment securities is about 92 per cent to 8 per cent. Quite apart from any ICC "exemption", a corporation so structured does not, I am advised by counsel, appear to fall within the 1940 Act's definition of an "investment company". To force Alleghany, nevertheless, to register under the Investment Company Act would subject it, unnecessarily, to the numerous restrictions on the conduct of its business described in paragraph 19, supra.

48. Plaintiff's further proposal that Alleghany now pay out as "dividends" the undistributed portions of its profits earned from 1969 to date also would inflict irreparable damage on the corporation. The "dividends" contemplated by the amended complaint appear to total over \$80 million.* For Alleghany to

* This figure is the sum of Alleghany's net incomes for the years 1969 through 1974, as reported in the company's Annual Reports for 1973 and 1974, less the total dividends paid out to all of Alleghany's shareholders during those years. That figure is presented here simply to show that Mr. Phillips' dividend demand, if granted, would almost certainly involve a very large payment. Whether this figure is the measure of undistributed profits for which plaintiff's amended complaint contends is unclear. The figure which Alleghany would contend for if the Court ever were to endorse Mr. Phillips' dividend theory, in whole or in part, is, I believe, not possible to ascertain in the present state of the record.

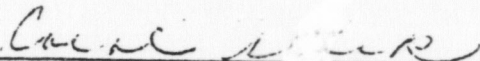
raise this amount in cash would require either extensive borrowings or a significant liquidation of corporate assets.



Jared C. Horton

Sworn to before me this

5th day of May, 1975



Notary Public

CAROL STARK

Notary Public, State of New York

No. 31-9156585

Qualified in New York County

Commission Expires March 30, 1976

SOUTHERN DISTRICT OF NEW YORK

----- x

RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorney for and guardians of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR., RALPH K. GOTTSALL, RICHARD R. HOUGH, WILLIAM G. RABE, CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of ALLEGHANY CORPORATION, and ALLEGHANY CORPORATION,

Defendants.

----- x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

THEODORE E. SOMERVILLE, being duly sworn, deposes and says:

1. I am Vice President and Counsel of Alleghany Corporation ("Alleghany") and am a member of the Bar of the State of New York. I submit this affidavit in support of the motions of defendants to dismiss the Amended Complaint (hereinafter "Complaint") in this action. I describe below the facts bearing on Alleghany's "citizenship" for the purposes of the jurisdictional allegations made in the Seventh Count of the Complaint.

2. Alleghany is incorporated under the laws of the State of Maryland.

74 Civil 5740
(RJW)

AFFIDAVIT

3. The following facts demonstrate, I submit, that 179a
Alleghany's principal place of business is in the State of
New York:

(a) The corporate headquarters of Alleghany
is located at 350 Park Avenue, New York, New York
10022.

(b) Although Alleghany owns and controls an
operating division which has terminals, garages and
related facilities at numerous places, Alleghany's
offices for all of its senior officers and executives,
including my own, are located at 350 Park Avenue,
where the bulk of the day-to-day activities of the
corporation take place.

(c) The meetings of Alleghany's board of
directors almost invariably take place in New York
at the corporate headquarters specified above.

(d) The address invariably given for Alleghany
in annual reports to shareholders, proxy solicitations,
filings with the Securities Exchange Commission (e.g., Form
12K's) and tax returns is the 350 Park Avenue address.

4. Alleghany has no office in Minneapolis. As plain-
tiff must know (§ 5(e), infra), Minneapolis is the headquarters
city of Investors Diversified Services, Inc. ("IDS"), a company
in which Alleghany has a substantial stock interest.*

* Plaintiff Phillips, as his long history of litigation against
Alleghany and IDS makes clear, claims considerable familiarity
with the affairs of both Alleghany and IDS. For a period in
the early 1960s, he was a member of IDS' board of directors, a
position which is the premise of the so-called "fee litiga-
tion" which Mr. Phillips currently is prosecuting against IDS.
Phillips v. Investors Diversified Services, Inc., S.D.N.Y., 72
Civ. 1544 (CHT).

5. Based on material contained in certain of Alleghany's litigation files, it appears that Mr. Phillips consistently has sought to place the location of Alleghany's "principal place of business" wherever it has suited his immediate tactical convenience. Thus, Mr. Phillips has contended:

(a) in 1963, in Proposed Findings of Fact and Conclusions of Law submitted by him in Alleghany Corp. v. Kirby, 218 F.Supp. 164 (S.D.N.Y.), aff'd, 333 F.2d 327 (2d Cir. 1964) (an action in which Mr. Phillips was a defendant), that Alleghany's principal place of business was 350 Park Avenue, New York, New York (Exhibit A hereto at p. 1);

(b) in 1964, in an Application for Indemnification of Expenses in connection with Alleghany Corp. v. Kirby, supra, that Alleghany's principal place of business was 350 Park Avenue, New York, New York (Exhibit B hereto at p. 2);

(c) in 1968, in an affidavit submitted by him in his role as a "consultant" to the attorney of record for the plaintiff in Most v. Alleghany Corp., S.D.N.Y., 66 Civ. 962, that diversity jurisdiction existed because Alleghany's principal place of business was located in New Jersey (Exhibit C hereto at p. 2);*

(d) in 1969, in an affidavit submitted by him in his role as a "consultant" to the attorney of record or the plaintiff in Smith v. Murchison, S.D.N.Y., 68

* Although Mr. Phillips' affidavit in Most contained such an assertion, Judge Wyatt, in granting motions to dismiss the complaint, stated: "[t]here is no averment of diversity jurisdiction and from affidavits submitted there could be none because plaintiff is a New York citizen and Alleghany has its principal place of business in New York." (A copy of Judge Wyatt's opinion will, I understand, be included in an Appendix of cases submitted for the Court's convenience.)

Civ. 3791, that Alleghany "transacts its principal business in the Southern District of New York" (Exhibit D hereto at p. 5);

(e) in 1972, in his complaint in Phillips v. Investors Diversified Services, Inc., S.D.N.Y., 72 Civ. 1544, the so-called "fee litigation," in which Alleghany was originally named as a defendant, that diversity jurisdiction existed because the principal place of business of IDS was Minneapolis, Minnesota. Mr. Phillips did not, however, allege that diversity existed vis-a-vis Alleghany, and, on motions to dismiss for lack of subject matter jurisdiction, Judge Brieant dismissed Alleghany from the case.* In papers filed in the fee litigation after Alleghany's dismissal, Mr. Phillips asserted that Alleghany's principal place of business was in Minneapolis, Minnesota (Exhibits E at p. 16 and F at p. 2).

6. In sum, Alleghany's principal place of business is in New York. Alleghany is a "citizen" of New York for purposes of 28 U.S.C. § 1332 (1970).

Theodore E. Somerville

Theodore E. Somerville

Sworn to before me this
5th day of May, 1975

Carol Stark
Notary Public

CAROL STARK
Notary Public, State of New York
No. 11-9156323
Qualified in New York County
- Commission Expires March 20, 1976

* A copy of Judge Brieant's opinion also will be included in the Appendix of cases.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

182a

RANDOLPH PHILLIPS,

74 Civil 5740 (RJW)

Plaintiff,

AFFIDAVIT

-against-

JOHN E. TOBIN et al.,

Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein, appearing pro se, and I make this affidavit in opposition to the motions of defendants Tobin, Burns, Fred M. Kirby and Allan P. Kirby and Alleghany Corporation for judgment on the pleadings and/or to dismiss the amended complaint.

1. In answer to the affidavit of Joseph A. Clark, III I reallege herein and incorporate by reference each and every one of the allegations in my affidavit herein affirmed to March 5, 1975, and I state this affidavit of Clark, III is neither a full nor fair picture of my activities during the last 30 years.

2. I deny that either as plaintiff herein nor as attorney for myself I have any conflict of interest. The subject matter of Randolph Phillips v. Investors Diversified Services, Inc., 72 Civil 1544 (SDNY) has nothing in common with the present litigation, and thus could in no way be a source of a conflict of interest. Nor is there any possibility that it will be settled.

3. Turning to the affidavit of Jared C. Horton, I deny that "Since June 5, 1945, up to and including the present date, Alleghany has been continuously subject to ICC jurisdiction..." (par. 9). As shown by Exhibit 1 to this affidavit (Alleghany Corporation Report of Annual Meeting of Shareowners April 26, 1968) under the heading "LEGAL MATTERS" "Mr. Tobin reported on Alleghany's problems in resolving legal problems ... He also stated that, in view of the merger of the New York Central into the Penn Central Company, Alleghany has filed a notification of registration as an investment company with the Securities and Exchange Commission. This move has been made pending determination as to Alleghany's status, whether it will continue to be subject to regulation by the Interstate Commerce Commission or to regulation as an investment company by the SEC." (pp. 3, 6). In this report to Alleghany stockholders, which I received as a stockholder, as with other reports no qualification or limitation as to this registration such as Horton sets forth in paragraph 17 of his affidavit was made, and thus defendants at all times made the unqualified representation to the Alleghany shareholders that it had registered as an investment company on April 10, 1968 with the SEC, a registration that was not terminated until August 21, 1970.

4. I append as Exhibit 2 to this affidavit two pages from the Section 5(2) application of Alleghany Corporation to the ICC in 1969 with the subheading 'To explain and support the reasonableness of the consideration involved in the proposed transaction.' But despite this

argument and supporting financial data the ICC refused to pass upon or approve of "the reasonableness of the proposed consideration" involved in the Jones Motor Co. transaction and never approved of the \$21 per share price. Despite the refusal of the ICC to do so as shown by the tenth paragraph of its Order of January 27, 1970, defendants seek to convey a contrary impression to this Court.

5. On May 2, 1973 Allan P. Kirby, who owned directly 21.1% of Alleghany's common stock and who controlled through family trusts another 30.5%, died. Thereafter Fred M. Kirby and Allan P. Kirby, Jr., defendants herein, became Executors of Allan P. Kirby's estate. The source of my information is the Proxy Statement of Alleghany Corporation dated April 3, 1974, p.1. A copy of this page is appended as Exhibit 3.

6. I at no time was served with notice of or a copy of Alleghany's application before the ICC under section 5(2) to acquire control of Jones Motor Co. I deny the purchase price was just and reasonable.

6. I deny the allegations in the Horton affidavit that the interests of the Alleghany stockholders would be prejudiced if the company were to register as an investment company with the SEC under the Investment Company Act, and I deny that their interests or the company's would be prejudiced if dividends were distributed to them as prayed for in the complaint.

Affirmed to before me this

2nd day of June 1975.

William Klass

WILLIAM KLASS
Notary Public, State of New York
No. 41-7297000 Queens County
Certificate filed in New York County
Term Expires March 30, 1976

Randolph Phillips
RANDOLPH PHILLIPS

EXHIBIT 1

Alleghany
Corporation
Report
of Annual
Meeting of
Shareowners
April 26, 1968

June 20, 1968

The annual meeting of shareowners of Alleghany Corporation was held April 26 at the Statler Hilton Hotel, Baltimore. More than 89 per cent of the common shares and 82 per cent of the 6% convertible preferred shares were represented in person or by proxy.

F. M. Kirby, chairman and president of the Corporation, presided at the meeting.

The following were elected directors representing the common stock, each receiving the votes of at least 6,089,863 shares:

| | |
|---------------------|----------------------|
| John J. Burns, Jr. | F. M. Kirby |
| Ralph K. Gottshall | Clifford H. Ramsdell |
| Charles T. Hill | Carlos J. Routh |
| James S. Hunt | Daniel E. Taylor |
| Allan P. Kirby, Jr. | John E. Tobin |

Elected as directors representing the preferred stock, each receiving the votes of 273,119 shares, were:

| | |
|-----------------|-----------------|
| Andrew Van Pelt | William G. Rabe |
|-----------------|-----------------|

Mr. Burns, who joined Alleghany on April 1 as vice president-finance, and Mr. Tobin, partner in the law firm of Donovan Leisure Newton & Irvine, general counsel to the Corporation, are new directors of Alleghany. Mr. Routh, president of the Pittston Company, was elected to the board in January.

Common shareholders ratified the appointment of Peat, Marwick, Mitchell & Co. as independent auditors of the company by a vote of 6,087,821 shares in favor and 2,194 opposed.

THE PRESIDENT'S REPORT

In his report on the Corporation, Mr. Kirby announced that net asset value per share of common stock as of March 31, 1968 was \$15.55, compared with \$14.89 on the same date in 1967, after provision for conversion of preferred, exercise of warrants, and estimated Federal tax on net unrealized appreciation of securities. Estimated net assets

per common share, on the same basis, as of the date of the meeting, were \$16.09.

Mr. Kirby stated that Alleghany was seeking to intervene as a plaintiff in litigation brought in New York against the Missouri Pacific Railroad Company and its controlling stockholder by another Class B shareholder of the railroad. Alleghany owns a majority of the Class B stock. The suit seeks to require the railroad to pay reasonable dividends on the Class B, the equity security of the MoPac. (Your Corporation's motion to intervene has since been granted.)

The president also announced that the entire amount of a note held by Alleghany and secured by a mortgage on acreage in the Garden City, L.I. area had been paid by Roosevelt Office Center, Inc. (formerly Land Value Corp.) on April 15. This fully compensates your Company for having accepted a majority interest in this property in 1963 in lieu of rent due on our Denver Court House Square property from the financially ailing, and later bankrupt, Webb & Knapp.

LEGAL MATTERS

Mr. Tobin reported on Alleghany's progress in resolving legal problems, most importantly a victory in the U.S. Supreme Court in the voting rights case against the Missouri Pacific; and dismissal by a three-judge court of further efforts to upset 1954 transactions leading to Alleghany's acquisition of 600,000 shares of New York Central stock. He also reported that the Corporation is negotiating with the Internal Revenue Service for settlement of disputed tax claims against the Company for the years 1958-1961.

He also stated that, in view of the merger of the New York Central into the Penn Central Company, Alleghany has filed a notification of registration as an investment company with the Securities and Exchange

(Text continued on page 6)

Commission. This move has been made pending definitive determination as to Alleghany's status, whether it will continue to be subject to regulation by the Interstate Commerce Commission or to regulation as an investment company by the SEC.

SHAREHOLDER QUESTIONS

Lewis Gilbert asked about Investors Diversified Services' position in Lytton Financial, a West Coast savings and loan holding company in default on certain of its notes.

Stuart F. Silloway, president of IDS, responded that one of the IDS funds held two Lytton notes and had been active in recent attempts to resolve the problem and to bring new top management to Lytton. (A new chief executive officer of Lytton was appointed subsequent to the Alleghany meeting.)

In response to a question, Mr. Silloway stated that during the present proxy season, IDS had recommended voting against management resolutions on three occasions, with a fourth under consideration.

A shareowner raised the question as to why the Corporation does not report earnings on a per share basis. He was advised that the matter would be reviewed, but that a more important figure for investment companies is net asset value per share.

Herbert Schrieber asked the amount of legal fees allowed Alleghany by the Court in the Missouri Pacific voting rights case. Mr. Tobin responded that fees of \$190,000 and expenses of \$25,000 were allowed, and that the railroad is appealing the award.

Frank Sheehan contrasted the book value of Missouri Pacific Class B (\$7100 per share) with market price (\$1700 per share) and asked if it were feasible to purchase additional shares. Mr. Kirby said that portions could be so bought, but pointed out that Alleghany owns more than half of the Class B, that book value of railroad stocks does not necessarily have any close relation to

market value, and that the Corporation continues to watch the MoPac situation very carefully.

In response to another question, Mr. Kirby said the Company has no present plans to disturb its holdings of Penn Central.

It was explained in answer to a question about Alleghany's status as a personal holding company and the tax consequences thereof, that prepayments of disputed income taxes and dividend distributions on Alleghany common stock had eliminated any personal holding company tax liability for the past two years, and that the management anticipated no future likelihood that the Corporation would be subjected to personal holding company taxes.

Richard F. Ruzicka protested against stock option and pension plans at Alleghany and elsewhere, and Mr. Kirby defended the practice.

Norman Churchman asked for a statement of general investment policy and Mr. Kirby replied:

"Alleghany is a nondiversified investment company, heavily committed in general financial services and railroad transportation. There is no plan to change this, nor is there expectation of restricting ourselves to these industries in the future. It is anticipated that Alleghany will continue to commit relatively substantial portions of its assets to relatively few investments, probably, for the most part, special situations in which long-term capital gains are primarily emphasized and income is a distant secondary consideration."

At its organization meeting held on May 7, the board of directors re-elected all officers and declared a dividend of 10 cents per common share payable June 20 to stockholders of record June 10.

EXHIBIT 2

Form SEC-44/45

-82-

EXHIBIT D.FACTS AND CIRCUMSTANCES WHICH APPLICANTS
RELY UPON TO WARRANT APPROVAL OF THE
PROPOSED TRANSACTION

Attach to original and each copy of this application
the following exhibits, identifying each as indicated:

- D-1. To explain and support the reasonableness of the
consideration involved in the proposed transaction.

The price per share paid for the common capital stock
of Jones, which was based upon arms-length bargaining, is
fully justified on the basis of Jones' past and potential
earnings. The common stock was purchased at \$21 per share,
and the preferred at par plus accrued dividends. The prices
listed below indicate the high and low bid prices in the over-
the-counter market of the Common Stock of Jones from January
1, 1964 to December 31, 1968, adjusted for stock dividends
paid in 1964, 1966 and 1967. These prices are inter-dealer
prices without mark-up, mark-down or commission and do not
necessarily represent actual retail sales.

| | | Bid | |
|------|---------------|--------|-------|
| | | High | Low |
| 1964 | | 13.375 | 8.75 |
| 1965 | | 14.625 | 10.50 |
| 1966 | | 15.625 | 10.25 |
| | | | 12.25 |
| 1967 | First Quarter | 13.75 | 11.00 |
| | Second " | 13.75 | 11.25 |
| | Third " | 13.75 | 11.75 |
| | Fourth " | 13.50 | |
| | | | 13.75 |
| 1968 | First Quarter | 14.75 | 12.75 |
| | Second " | 16.50 | 16.50 |
| | *Third " | 21.00 | 12.00 |
| | Fourth " | 20.50 | |

* Alleghany's tender offer at \$21 per share was made
during this quarter.

Form SEC-44/45

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EXHIBIT D-1 - Continued

The book value per share of the Common Stock of Jones at September 30, 1968 and for each of the past five fiscal years was as follows:

| <u>Year</u> | <u>Book Value**</u> |
|-------------|---------------------|
| 1963 | \$ 5.00 |
| 1964 | 6.59 |
| 1965 | 7.65 |
| 1966 | 8.95 |
| 1967 | 9.73 |

Nine Months ended
September 30, 1968

11.17

The agreement as amended on September 27, 1968 provides, contingent on the approval of this Commission, for the merger of Alleghany Trucking Co., Inc. ("Truck Co.") a wholly owned subsidiary of Alleghany formed for this purpose, into Jones. On the effective date of the merger each outstanding share of Jones Common Stock held by persons other than Alleghany (or a voting trust for its benefit) shall be automatically converted into a right to receive \$21 in cash from Jones, and each share of Truck Co. shall be automatically converted into one share of stock of Jones. Jones will therefore become a wholly-owned subsidiary of Alleghany.

The price of \$21 per share which will be paid to each Jones stockholder pursuant to the merger is the price paid to all former stockholders who tendered their shares in response to the September 5, 1968 tender offer by Alleghany.

** Based on average number of shares outstanding after giving retroactive effect to stock dividends.

EXHIBIT 3

ALLEGHANY CORPORATION

350 Park Avenue
New York, New York 10022

PROXY STATEMENT

Annual Meeting of Stockholders to be held April 26, 1974

This statement is furnished in connection with the solicitation of proxies by your management from holders of the outstanding shares of Common Stock of Alleghany Corporation ("the Company" or "Alleghany") entitled to vote at the Annual Meeting of Stockholders of the Company (and at any and all adjournments thereof) for the purposes referred to below and set forth in the accompanying Notice of Annual Meeting of Stockholders. These proxy materials are being mailed to stockholders on or about April 3, 1974.

The Board of Directors has fixed the close of business on March 18, 1974 as the record date for the determination of stockholders entitled to notice of, and to vote at, said meeting. On that date there were outstanding and entitled to vote 7,821,090 shares of Common Stock. Holders of Common Stock are entitled to one vote for each share held of record on the record date with respect to matters on which each such holder is entitled to vote.

Mr. Allan P. Kirby, Chairman of the Board Emeritus of the Company, of whose property Messrs. F. M. Kirby and Allan P. Kirby, Jr. were guardians, died on May 2, 1973. His will was admitted to probate on May 14, 1973. As of February 15, 1974, Mr. Kirby's estate beneficially owned 1,647,613 shares or approximately 21.1% of the Company's outstanding Common Stock. Mr. Kirby's executors, who have power to vote the Alleghany Common Stock owned by his estate, are Messrs. F. M. Kirby, Allan P. Kirby, Jr. and William C. Rabe and Manufacturers Hanover Trust Company. Under the terms of Mr. Kirby's will, his executors act by majority vote, except that any joint decision of Messrs. F. M. Kirby and Allan P. Kirby, Jr. is binding upon the other executors.

1,382,613 of the shares beneficially owned by the estate of Allan P. Kirby were held of record by Sigler & Co., a nominee of Manufacturers Hanover Trust Company. As of February 15, 1974 Sigler & Co. also held of record an additional 295,939 shares, which, together with the 1,382,613 shares mentioned above, constituted approximately 21.5% of the Company's outstanding Common Stock.

As of February 15, 1974 certain Kirby family trusts beneficially owned 2,382,200 shares, or approximately 30.5%, of the Company's outstanding Common Stock. One-half, or 1,191,100, of such shares were owned by a trust for the benefit of Mrs. Allan P. Kirby, the trustees of which are Mrs. Allan P. Kirby and her four children, Grace Kirby Culbertson, Ann Kirby Kirby, Allan P. Kirby, Jr. and F. M. Kirby; these shares are held by a custodian under an agreement, terminable upon 30 days' notice, providing that the shares will be voted for management unless otherwise unanimously determined by the trustees. The other one-half were owned by various trusts for the benefit of the children and grandchildren of Allan P. Kirby. Each of the children of Allan P. Kirby is a trustee of the trusts created for his or her own benefit and for the benefit of his or her own children. The shares owned in trust for the benefit of Mrs. Allan P. Kirby and 100,051 of the shares owned in trust for the benefit of her grandchildren, constituting approximately 16.5% of the Company's outstanding Common Stock, were held of record by Millen & Company, a nominee of First National Iron Bank of New Jersey.

On and for some time prior to August 19, 1973, the above-mentioned 2,382,200 shares of the Company's Common Stock were owned by The Allan Corporation. The stockholders of The Allan Corporation on August 19, 1973 were the estate of Allan P. Kirby and the Kirby family trusts mentioned above, the trustees of each of which were at that time Mrs. Allan P. Kirby and her four children. Pursuant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

191a

RANDOLPH PHILLIPS,

Plaintiff,

74 Civil 5740 (RJV)

-against-

AFFIDAVIT

JOHN E. TOBIN et al.,

Defendants.

Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, N.Y. 10021
212-734-6776

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

192a

RANDOLPH PHILLIPS,

Plaintiff,

74 Civil 5740

REPLY AFFIDAVIT

-v-

JOHN E. TOBIN et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein and I make this Reply Affidavit in support of my opposition to the motions of defendants to dismiss the complaint or for judgment on the pleadings.

1. The 1973 Annual Report of Alleghany Corporation released under date of March 18, 1974 and thereafter received by me as a beneficial owner of Alleghany common stock from my broker states:

"JONES MOTOR

* * * The excess of cost over the fair value of Jones Motor assets at the date it was acquired was \$6,336,208; * * * " (p.13, note 1)

This was the first disclosure of this fact to the common stockholders.

Obviously a claim for recovery of this sum so huge (some 90% over the fair value of the assets of some \$7 million) as to be fraudulent could not be alleged until its discovery in 1974. It was that discovery that led to my filing of the complaint on the Jones claims.

2. I have read the affidavits of Gerald P. Nugent, Jr., President of Jones Motor Co. and of John J. Burns, Vice President of Alleghany Corporation, each sworn to September 30, 1969 in the ICC proceedings reported upon in Alleghany Corporation --Control and Purchase -- Jones Motor Co., etc., 109 MCC 333, and I hereby verify that the excerpts from said affidavits quoted at page 14 of my Reply Brief are true and correct reproductions thereof.

3. I have received and read each of the Proxy Statements of Alleghany Corporation for the last 7 years and I know therefrom that each annual meeting in those years, including the 1974 meeting, was held outside the State of New York.

4. From my long and close relationship with Alleghany Corporation dating back to 1939 when I was first retained as Executive Assistant to Chairman Robert R. Young and through 1960 when I became Chairman of the Finance & Law Committee of the Board of Directors of Investors Diversified Services, Inc. and based on my knowledge to date, I know that the headquarters of the Kirby family and of Allan P. Kirby, Sr. and his sons as controlling parties of Alleghany Corporation has always been 17 DeHart Street, Morristown, New Jersey, and thus if Minneapolis, Minnesota is not the site of its principal place of Alleghany's business, then New Jersey is and diversity exists between all the parties to this action.

5. I have read the affidavit of Theodore E. Somerville, Vice President of Alleghany, submitted by the corporation in support of its motion. I deny that "the bulk of the day-to-day activities" of the Alleghany group of companies "take place" at "350 Park Avenue, New York, New York 10022." From my examination of the reports of the various companies involved as of December 30, 1974, it is clear that this is not true. In any event, "day-to-day activities" do not establish the control of these companies is exercised from New York, as distinct from Morristown, New Jersey and Minneapolis, Minnesota.

7. The office at 350 Park Avenue is merely an administrative and clerical office and not the situs of the executive control, which is Morristown, New Jersey.

8. I hereby request discovery on this issue, if there is any doubt with respect to it.

Affirmed to before me this

30th day of June, 1975.

YONI A. ESPOSITO
Notary Public, State of New York
No. 31-60771
Qualified in New York County
Commission Expires March 29, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

195a

RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN et al.,

Defendants.

74 Civil 5740 (RJW)

PLAINTIFF'S REPLY

AFFIDAVIT

Randolph Phillips
Attorney Pro Se
30 East 72nd Street
New York, N. Y. 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY,
ALLAN P. KIRBY, JR., each in
their own capacity as directors
of Alleghany Corporation, and as
attorney for and guardians of the
property of Allan P. Kirby, Sr., JOHN J.
BURNS, JR., RALPH K. GOTTSHALL, RICHARD
R. HOUGH, WILLIAM G. RABE, CLIFFORD H. :
RAMSDELL, and CARLOS J. ROUTH, as
directors of ALLEGHANY CORPORATION,
and ALLEGHANY CORPORATION,

Defendants.

-----x
Defendants, Alleghany Corporation ("Alleghany")
and certain of its directors, move for judgment pursuant
to Rule 12(c), Fed. R. Civ. P., dismissing the amended
complaint of plaintiff Randolph Phillips ("Phillips").
For the reasons hereinafter stated, the motion is granted
in part and denied in part.

"The affairs of Alleghany Corporation . . . have
given rise to a flood of litigation that must be unparalleled
in American corporation law." Willheim v. Murchison, 342
F.2d 33, 35 (2d Cir. 1965). This action adds to that flood.

* Although defendants have made two separate Rule 12(c)
motions, the Court has treated them as one inasmuch as
they raise the same issues.

Phillips, the beneficial owner of shares of Alleghany's common stock, charges violations of the Investment Company Act (15 U.S.C. §80a et seq.), the federal securities laws, and the common law fiduciary duties of defendant directors. The violations are alleged to have taken place in the course of Alleghany's 1968 acquisition of the Jones Motor Company, Inc. ("Jones") and in the corporation's purported delay in selling its Penn Central shares in 1969.

Rule 12(c), Fed. R. Civ. P., under which defendants move, provides in pertinent part:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The complaint is challenged on several grounds. Defendants claim that Alleghany is exempt from the Investment Company Act because the Interstate Commerce Commission ("the ICC") has subjected the corporation to its regulation. They assert that ICC approval of the Jones transaction has deprived the Court of subject matter jurisdiction and requires that any claims relating to that acquisition be pursued under the mechanisms provided by the Urgent Deficiencies Act (28 U.S.C. §2321). Lack of subject matter jurisdiction over the common law fiduciary duty claims is also argued, based on lack of complete diversity.

Additionally, defendants maintain that Phillips' allegations of violations of federal securities law fail to state a claim, that certain counts of his complaint are foreclosed by the applicable statutes of limitation, and that all requested equitable relief is barred by laches. Finally, it is argued that Phillips cannot provide the representation required by Rule 23.1, Fed. R. Civ. P., that as a layman, he may not prosecute a derivative suit pro se, and that his pleadings fail to satisfy the demands of the federal rules.

Plaintiff's complaint consists of seven counts. First the Court will deal with those which arise under the Interstate Commerce Act and the Investment Company Act; these go to the subject matter jurisdiction of this tribunal. Next to be discussed will be those counts which claim violations of the anti-fraud provisions of federal securities law. Finally, the last count, which involves state law claims, will be examined.

The bulk of Count I as well as part of Count VI and all of Counts II and IV raise questions regarding the authority of the ICC to regulate Alleghany's activities. Thus, crucial to a disposition of this motion is a determination of Alleghany's status as an entity subject to ICC regulation. A brief review of the corporation's past is in order.

In 1940 Alleghany registered with the Securities and Exchange Commission ("the SEC") as an investment company. Five years later, the corporation's application for ICC approval of its acquisition of certain railroad interests was granted. In its directive the ICC indicated that "unless and until otherwise ordered by this Commission Alleghany Corporation shall be considered as a carrier subject to," applicable Interstate Commerce Act provisions. In the same year, the SEC declared that Alleghany was no longer an investment company. At this time Alleghany owned controlling stock interests in both the Chesapeake & Ohio Railway Company ("C&O") and Pittston Company, a trucking concern. In 1954, the C&O stock was sold and subsequently control of the New York Central Railroad Company ("Central") was secured. Later that year, wishing to merge two Central subsidiaries, Alleghany sought ICC approval. The application was granted by Division IV of the ICC in 1955; its decision was later affirmed by the full Commission. Division IV held that the 1945 ICC order with its "unless and until otherwise ordered" language was still in effect, unaltered by any of Alleghany's shifting stock interests.

In 1966 Alleghany relinquished control of Central, and in 1968, acquired Jones. Phillips claims that with surrender of its Central interests Alleghany ceased to be subject

to ICC regulation, and reverted to the status of an investment company. He points to Alleghany's registration in 1968 with the SEC, a move which defendants assert was done with full disclaimers and designed solely to cover the possibility that proposed plans to apply to the ICC for continued regulation might fail and dire consequences result.

By an order dated January 27, 1970, the ICC approved, subject to conditions set forth in a report of the same date, Alleghany's acquisition of control of Jones. In addition, the ICC vacated its 1955 orders regulating Alleghany as a person not a carrier in control of a carrier under §5(3) of the Interstate Commerce Act and imposed regulation upon the corporation under Part II of the Act as a motor carrier. Alleghany Corp. - Control and Purchase - Jones Motor Co., Inc., 109 MC 333 (1970).

Subsequently, the SEC deregistered Alleghany under the Investment Company Act.

Section 3 of the Investment Company Act excepts from coverage "(9) Any company subject to regulation under the Interstate Commerce Act." Actions of the ICC are reviewable through the procedures provided by the Urgent Deficiencies Act.

A lawsuit may fall within the requirements of the Urgent Deficiencies Act even though there be no request by the plaintiff that a Commission order be set aside and even though no specific order be mentioned on the face of the pleadings. If it can be

established extrinsically that the practical effect of success on the merits by the party making the claim would be to invalidate, countermand or contradict an ICC order, the Act applies and its requirements must be met. Venner v. Michigan Central Railroad Co., 271 U.S. 127, 46 S. Ct. 444, 70 L.Ed. 868 (1926); B.F. Goodrich Co. v. Northwest Industries, Inc., 424 F.2d 1349 (3rd Cir.), cert. denied, 400 U.S. 822, 91 S. Ct. 41, 27 L.Ed2d 50 (1970); Schwartz v. Bowman, 244 F. Supp. 51 (S.D.N.Y. 1965), aff'd per curiam, 360 F.2d 211 (2d Cir.), cert. denied, 385 U.S. 921, 87 S.Ct. 230, 17 L.Ed.2d 145 (1966); United States v. Railway Express Agency, 101 F. Supp. 1008 (D.Del. 1951).

REA Express Inc. v. Alabama Great Southern Railroad Co., 343 F. Supp. 851, 856 (S.D.N.Y. 1972), aff'd, 412 U.S. 934 (1973).

Phillips' suit, insofar as it concerns the Jones transaction, appears to fall within the purview of the Urgent Deficiencies Act. To the extent that it was approved by the ICC, the acquisition can only be challenged through the channels provided for review of ICC actions. In this regard, the reasoning of Schwartz v. Bowman, 244 F. Supp. 51 (S.D.N.Y. 1965), cert. denied, 385 U.S. 921 (1966), is persuasive. Schwartz is an earlier page in Alleghany's voluminous litigation history. At issue were substantially similar issues albeit involving a different time period. As

phrased by Judge Bryan:

Thus, the threshold jurisdictional question presented [asks:]

(1) Did the outstanding orders and decisions of the ICC determine that at all relevant times Alleghany was subject to regulation under the Interstate Commerce Act and was therefore, under the express terms of the Investment Company Act, not an investment company which was required to register with the SEC?

(2) Does the private action at bar necessarily involve directly or indirectly an attack on the validity of such orders and decisions?

244 F. Supp. at 55.

Schwartz involved the 1954 sale of C&O and purchase of Central. Violations of the Investment Company Act were claimed and failure to register with the SEC was charged.

Judge Bryan concluded:

1. The ICC has determined by its orders of June 5, 1945, March 2, 1955 (Division IV) and May 24, 1955, that during the period of time relevant here [January 19, 1954 to February 23, 1954] Alleghany was subject to regulation by the Commission under the Interstate Commerce Act.

2. Such orders insofar as they affect the relevant time period have never been reversed, vacated, set aside or modified in any proceedings to review under the Urgent Deficiencies Act.

3. In the action before the three judge court under that act to review the March 2 and May 24, 1955 orders of the Commission holding Alleghany subject to Interstate Commerce Act regulation, the orders were sustained.

4. If these outstanding orders of the ICC are to be given effect, Alleghany was expressly exempt from the Investment Company Act pursuant to §3(c)(9) at the time of the Central transaction and was not required to register with the SEC or subject to regulation by that body.

244 F. Supp. at 64. Consequently, he held that the Urgent Deficiencies Act provided the only recourse for the plaintiffs because, "the action necessarily involves an attack on the validity of ICC orders and decisions, at the least indirectly, since it cannot succeed unless such determinations are overridden." 244 F. Supp. at 65. Plaintiff's declared reliance on Fielding v. Allen, 181 F.2d 163 (2d Cir.), cert. denied, 300 U.S. 817 (1950) is misplaced. The questions determined in that suit, as stated by the Court, were "[w]hether the count alleges a cause of action founded upon a federal statute, and whether, if it does, the New York statute as to security applies." 181 F.2d at 165. Fielding did not involve a possible conflict between different modes of federal review and thus is of no aid to the jurisdictional question this Court faces.

The 1970 ICC action, vacating its earlier orders as it imposed more stringent regulation, suggests as indicated by the Commission's past practice and by the Schwartz reasoning, that the "unless and until otherwise ordered" language of the 1955 order is to be taken literally. ICC regulation continues until the Commission orders otherwise.

And ICC regulation bars the applicability of the Investment Company Act and any claims arising thereunder. Thus, Counts II, IV and those portions of Counts I and VI which challenge, directly or indirectly, orders of the Interstate Commerce Commission are dismissed.

Additionally, Count VI of the complaint in part attacks as void a 1970 order of the SEC deregistering Alleghany under the Investment Company Act. Review of such orders rests with the courts of appeal; this Court lacks subject matter jurisdiction. 15 U.S.C. §80a-42. Accordingly, Count VI is dismissed in its entirety.

In Count III and also in Count I, the Jones transaction and certain alleged omissions in a proxy statement are challenged as violative of the anti-fraud provisions of the Securities Exchange Act of 1934. It is not contended that ICC regulation exempts Alleghany from the reach of the anti-fraud provisions of federal securities law.

Phillips charges in Count III violations of Rule 10b-5 promulgated under the Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.), and in Count I the breach of §14a of that Act (15 U.S.C. §78n(a)), and SEC proxy rule 14a-9 arising from the Jones acquisition. His claim that the price paid for the motor company was exorbitant presents a fact question and adjudication of the issue at this juncture would be impermissible. Although the challenged proxy solicitation related

to authorization for Alleghany to withdraw its SEC registration and to amend its charter to do business as a motor carrier rather than to approval of the Jones purchase itself, the connection between the assents sought and the acquisition is not so attenuated as to bar a 10b-5 action as a matter of law.

Since the claim arose in 1970 when ICC approval was secured, it is not time barred.

The plaintiff, who is neither a buyer nor a seller of the shares involved has no individual claim for relief under 10b-5. Birnbaum v. Newport Steel Corp., 193 F.2d 461. (2d Cir.), cert. denied, 343 U.S. 956 (1952). Blue Chip Stamps v. Manor Drug Stores, 43 U.S.L.W. 4707 (U.S. June 9, 1975). Consequently, his 10b-5 complaint raised in Count III may only be maintained derivatively.

Count V of Phillips' complaint asserts a violation of Rule 10b-5 regarding Alleghany's "failure" to sell its Penn Central stock in 1969. The fraud which lies at the base of this claim is somewhat difficult to trace. Plaintiff argues that the re-election of defendant directors in 1969 resulted in part from proxies obtained through a false proxy statement. This statement and the corporation's 1968 annual report "implicitly represented" that the directors were carrying out their duties free from conflicts of interest. The statement and the report, however, neglected to disclose the Penn

Central holdings of certain of the directors or that half of the Alleghany directors sat on the Penn Central board or the boards of its subsidiaries. This charged "conflict of interest," Phillips contends, caused the directors to choose not to sell Alleghany's Penn Central holdings in 1969 as should have been done to prevent substantial losses which occurred when the stock was traded at a later date.

In light of the Birnbaum rule, plaintiff has no individual cause of action. His derivative claim is also subject to attack. In order to make out a 10b-5 cause of action the plaintiff must indicate that the acts complained of bear some "causal connection [to] the alleged violation of the Rule. . . ." Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 547 (2d Cir. 1967). The connection here appears tenuous at best.

The Second Circuit has indicated that judgment on the pleadings should be granted sparingly against plaintiffs in stockholder derivative suits. This advice is predicated, however, on the reasoning that the complainant has, "little or no familiarity with the internal affairs of the corporation." Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). This state of events hardly seems to be the case here.

Not every charge of corporate mismanagement presents a 10b-5 claim. As stated in Haberman v. Murchison, 331 F. Supp. 180, 188 (S.D.N.Y. 1971), aff'd, 468 F.2d 1305 (2d Cir. 1972)

The alleged false proxy statement did not affect corporate action beyond the election of the defendants to office. Their subsequent actions in allegedly obtaining premiums for the sale of offices were remote from the so called proxy fraud. We do not believe that falsity in a proxy statement for the election of directors who later commit wrongs can stand on its own as a claim for relief. If wrong was done to the corporation it is actionable regardless of the mode of election of those who breached their fiduciary duty.

Plaintiff may seek recourse under state law for the purported breach of duty; he has failed to make out a 10b-5 claim. Count V is, therefore, dismissed.

Count VII of the complaint charges breach of defendants' fiduciary duties under state law. Jurisdiction is purportedly based on diversity. The cases cited by Phillips to bolster his claim that the principal place of business of a corporation, for diversity purposes, is the location of its major subsidiary do not support such a contention in this instance. This Court could, however, retain jurisdiction.

Since there is subject matter jurisdiction with regard to the federal cause of action, we may, in our discretion, retain jurisdiction over dependent state causes of action derived from "a common nucleus of

operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). See also *Almenares v. Wyman*, 453 F.2d 1075, 1083-86 (2d Cir. 1971), cert. denied, 405 U.S. 944, 92 S. Ct. 962, 30 L.Ed.2d 815 (1972); *Drachman v. Harvey*, 453 F.2d 722, 737-38 (2d Cir. 1972) (rehearing en banc).

Grenader v. Spitz, 390 F. Supp. 1112, 1116 (S.D.N.Y. 1975).

Since the Court has not dismissed Count III involving purported violations of federal securities law in the Jones transaction those state claims which concern that acquisition will be heard also. All other portions of Count VII are dismissed.

Defendants raise a variety of challenges to Phillips' fitness to maintain this suit pro se under the strictures of Rule 23.1, Fed. R. Civ. P. These arguments as well as all others alleging defects in plaintiff's pleadings and substance have been examined by the Court and are rejected.

For the foregoing reasons, defendants' motion to dismiss is granted in part and denied in part. Counts II, IV, V, and VI of Phillips' amended complaint are dismissed. Defendants' motion to dismiss the proxy fraud claim alleged in Count I, the derivative 10b-5 cause of action contained in Count III, and the Count VII state claims which arise from the Jones acquisition is denied.

It is so ordered.

Dated: November 5, 1975

Robert K. Smith

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

209a

- - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- :

JOHN E. TOBIN, FRED M. KIRBY, ALLAN :
P. KIRBY, JR., each in thier own :
capacity as directors of Alleghany : 74 Civil 5740 (RJW)
Corporation, and as attorney for :
and guardian of the property of :
Allan P. Kirby, Sr., JOHN J. BURNS, : NOTICE OF APPEAL
JR., RALPH K. GOTTSHALL, RICHARD R. :
HOUGH, WILLIAM G. RABE, CLIFFORD M. :
RAMSDALL, and CARLOS J. ROUTH, as :
directors of Alleghany Corporation, :
and ALLEGHANY CORPORATION, :

Defendants. :

- - - - - x

Notice is hereby given that defendant Alleghany Corpo-
ration ("Alleghany") hereby appeals to the United States Court
of Appeals for the Second Circuit from so much of the Order of
the Hon. Robert J. Ward in this action, dated November 5, 1975
and entered November 6, 1975, as denied Alleghany's motion to
dismiss plaintiff Randolph Phillips' amended complaint on either
of the grounds that Mr. Phillips, a layman, cannot prosecute pro
se a derivative action on behalf of Alleghany or that Mr. Phillips
is not an adequate representative plaintiff who may maintain a
derivative action on behalf of Alleghany pursuant to Rule 23.1
of the Federal Rules of Civil Procedure.

Dated: December 5, 1975

CAHILL GORDON & REINDEL

By _____
A Member of the Firm
Attorneys for Defendant
Alleghany Corporation
Office and P. O. Address
80 Pine Street
New York, New York 10005
(212) 944-7400

TO:

Clerk of the Court
United States District Court
for the Southern District
of New York
United States Courthouse
Foley Square
New York, New York 10007

Mr. Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

Debevoise, Plimpton, Lyons & Gates, Esqs.
Attorneys for Defendants John E. Tobin,
Fred M. Kirby, Allan P. Kirby, Jr.
and John J. Burns, Jr.
299 Park Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RANDOLPH PHILLIPS, :

Plaintiff, :

-against- :

74 Civil 5740 (RJW)

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own
capacity as directors of Alleghany
Corporation, and as attorney for
and guardian of the property of
Allan P. Kirby, Sr., JOHN J. BURNS,
JR., RALPH K. GOTTSALL, RICHARD R.
HOUGH, WILLIAM G. RABE, CLIFFORD M.
RAMSDELL, and CARLOS J. ROUTH, as
directors of Alleghany Corporation,
and ALLEGHANY CORPORATION, :

: NOTICE OF APPEAL

Defendants. :
----- x

Notice is hereby given that John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr., and John J. Burns, Jr., defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the Order of the Hon. Robert J. Ward in this action, dated November 5, 1975 and entered November 6, 1975, as denied defendants' motion to dismiss plaintiff Randolph Phillips' amended complaint on the grounds that (a) Mr. Phillips, who is not an attorney, cannot prosecute pro se a derivative action on behalf of defendant Alleghany Corporation or (b) Mr. Phillips

is not an adequate representative plaintiff who may maintain a derivative action on behalf of Alleghany Corporation pursuant to Rule 23.1 of the Federal Rules of Civil Procedure.

Dated: New York, New York
December 5, 1975

DEBEVOISE, PLIMPTON, LYONS & GATES

ROBERT L. GEMESS

By _____
A Member of the Firm
Attorneys for Defendants John E.
Tobin, Fred M. Kirby, Allan P. Kirby,
Jr., and John J. Burns, Jr.
299 Park Avenue
New York, New York 10017
(212) 752-6400

TO: Clerk of the Court
U. S. District Court for
the Southern District of New York

Clerk of the Court
U. S. Court of Appeals for
the Second Circuit

Mr. Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

Messrs. Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
Attorneys for Defendant
Alleghany Corporation

MEMO ENDORSED

Ward

213a.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

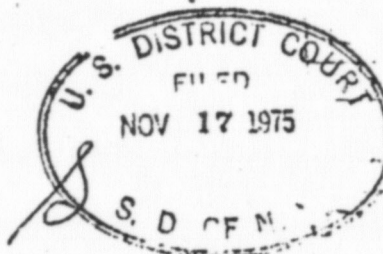
----- x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, et al.,

Defendants.
----- x



: NOTICE OF MOTION FOR
: REARGUMENT

: 74 Civ. 5740 (RJH)
:

SIRS:

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, dated November 17, 1975, and upon all the proceedings and papers heretofore filed in the above-entitled action, the undersigned, as attorneys for the defendants John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr., and John J. Burns, Jr., will move this Court, before the Honorable Robert J. Ward, United States District Judge, in Room 619, United States Courthouse, Foley Square, New York, New York, on December 2, 1975, at 2:15 p.m., or as soon thereafter as counsel can be heard, pursuant to Rule 9(m) of the General Rules of this Court for leave to reargue so much of their motion for judgment on the pleadings dismissing Counts One, Three, and Seven of the Amended Complaint as was denied by this Court in its

74 Civ. 5740 (RJW)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, et al.,

Defendants.

NOTICE OF MOTION
FOR REARGUMENT

DEBEVOISE, PLIMPTON, LYONS & GATES

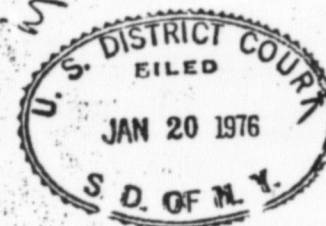
ATTORNEYS FOR Defendants John E. Tobin,
Fred M. Kirby, Allan P. Kirby, Jr.
and John J. Burns, Jr.
199 PARK AVENUE,BOROUGH OF MANHATTAN,
CITY OF NEW YORK,
NEW YORK

732-6400

January 19, 1976

Motion denied.

As ordered.

Robert A. Ward
U.S.D.J.

MICROFILM

JAN 21 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
RANDOLPH PHILLIPS,

Plaintiff,

- against -

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own
capacity as directors of Alleghany
Corporation, and as attorney for
and guardian of the property of
Allan P. Kirby, Sr., JOHN J. BURNS,
JR., RALPH K. GOTTSALL, RICHARD R.
HOUGH, WILLIAM G. RABE, CLIFFORD M.
RAMSDELL, and CARLOS J. ROUTH, as
directors of ALLEGHANY CORPORATION,
and ALLEGHANY CORPORATION,

Defendants.
-----f

74 Civil 5740 (RJW)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, pursuant to Rule 9(m) of
this Court's General Rules, upon the Memorandum In Support of
Motion for Clarification of Court's Opinion, the pleadings, and
all the prior proceedings had herein, defendant Alleghany
Corporation ("Alleghany") will move this Court in Room 619,
United States Courthouse, Foley Square, New York, New York,
before the Hon. Robert J. Ward on the 2nd day of December, 1975
at 2:15 P.M. or as soon thereafter as counsel can be heard, for
an order for clarification of this Court's order and opinion
dated November 5, 1975, and for such other and further relief
as to this Court may seem just and proper.

Dated: New York, New York
November 17, 1975

CAHILL GORDON & REINDEL

By 

H. Richard Schumacher

Attorneys for Defendant
Alleghany Corporation
Office & P.O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, et al.,

Defendants.

NOTICE OF MOTION

CAHILL GORDON & REINDEL

Attorneys for Defendant

Alleghany Corporation

Office and Post Office Address,

80 Pine Street,

Borough of Manhattan, New York, N. Y. 10005

944-7400

To _____ Esq.

Attorney for _____

Due and timely service of a copy of the
within _____

is hereby admitted.

Dated, N. Y., _____, 19____

Attorneys for _____

January 19, 1976

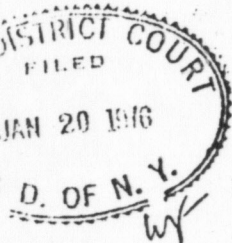
Motion denied.

So ordered.

Robert J. Ward
U.S.D.J.

MICROFILM

JAN 21 1976



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN
P. KIRBY, JR., each in their own
capacity as directors of Alleghany
Corporation, and as attorney for
and guardian of the property of
Allan P. Kirby, Sr., JOHN J. BURNS,
JR., RALPH K. GOTTSALL, RICHARD R.
HOUGH, WILLIAM G. RABE, CLIFFORD M.
RAMSDALL, and CARLOS J. ROUTH, as
directors of Alleghany Corporation,
and ALLEGHANY CORPORATION,

Defendants.

74 Civil 5740 (RJW)

NOTICE OF APPEAL

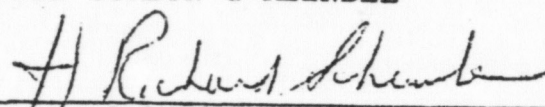
----- -x
Notice is hereby given that defendant Alleghany Corpo-
ration ("Alleghany") hereby appeals to the United States Court
of Appeals for the Second Circuit from so much of the Orders
of the Hon. Robert J. Ward in this action, entered November
6, 1975 and January 20, 1976, as denied Alleghany's motion
to dismiss plaintiff Randolph Phillips' amended complaint on
either of the grounds that Mr. Phillips, a layman, cannot
prosecute pro se a derivative action on behalf of Alleghany
or that Mr. Phillips is not an adequate representative plaintiff

who may maintain a derivative action on behalf of Alleghany pursuant to Rule 23.1 of the Federal Rules of Civil Procedure.

Dated: February 6 , 1976

CAHILL GORDON & REINDEL

By



A Member of the Firm

Attorneys for Defendant

Alleghany Corporation

Office and P.O. Address:

80 Pine Street

New York, New York 10005

(212) 944-7400

TO:

Clerk of the Court
United States District Court
for the Southern District
of New York
United States Courthouse
Foley Square
New York, New York 10007

Mr. Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

Debevoise, Plimpton, Lyons & Gates, Esqs.
Attorneys for Defendants John E. Tobin,
Fred M. Kirby, Allan P. Kirby, Jr., and
John J. Burns, Jr.
299 Park Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
RANDOLPH PHILLIPS,

Plaintiff,

-against-

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorney for and guardian of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR., RALPH K. GOTTSCHALL, RICHARD R. HOUGH, WILLIAM G. RABE, CLIFFORD M. RAMSDELL, and CARLOS J. ROUTH, as directors of Alleghany Corporation, and ALLEGHANY CORPORATION,

Defendants.
----- x

74 Civil 57

NOTICE OF APPEAL

Notice is hereby given that John E. Tobin, Kirby, Allan P. Kirby, Jr., and John J. Burns, Jr., defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the Orders of the Honorable Robert J. Ward in this action, entered November 6, 1975 and January 20, 1976, as denied defendants' motion to dismiss plaintiff Randolph Phillips' amended complaint on the grounds that (a) Mr. Phillips, who is not an attorney, cannot prosecute pro se a derivative action on behalf of defendant Alleghany Corporation or (b) Mr. Phillips is not an adequate representative plaintiff who may maintain

a derivative action on behalf of Alleghany Corporation
pursuant to Rule 23.1 of the Federal Rules of Civil Procedure.

Dated: New York, New York
February 6, 1976

DEBEVOISE, PLIMPTON, LYONS & GATES

By

Robert J. Henneil

A Member of the Firm

Attorneys for Defendants John E.
Tobin, Fred M. Kirby, Allan P.
Kirby, Jr., and John J. Burns, Jr.
299 Park Avenue
New York, New York 10017
(212) 752-6400

TO: Clerk of the Court
U. S. District Court for
the Southern District of New York

Clerk of the Court
U. S. Court of Appeals for
the Second Circuit

Mr. Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

Messrs. Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
Attorneys for Defendant
Alleghany Corporation

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 SS.:
COUNTY OF NEW YORK)

Robert Belluscio, being duly sworn, deposes and
says:

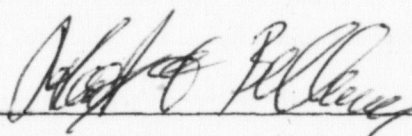
1. I am over the age of 18 years and not a party
to this action.

2. On the 20th day of February, 1976, I served the
annexed Brief and Joint Appendix upon:

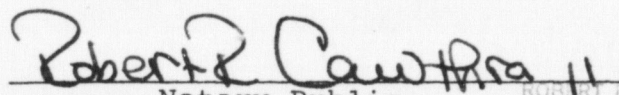
Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, New York 10017

Mr. Randolph Phillips
30 East 72nd Street
New York, New York 10021

by depositing true and correct copies thereof in the letter
drop maintained by the United States Postal Service at 80 Pine
Street, New York, New York 10005, enclosed in stamped, sealed
envelopes addressed to the above-mentioned attorneys and party.



Sworn to before me this
20th day of February, 1976


Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0503/10
Qualified in New York County
Commission Expires March 30, 1977